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No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

LARRY WOLLERSHEIM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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Dated: February 23, 1990

QUESTIONS PRESENTED

1. Whether the free exercise clause of the First Amendment prohibits courts from imposing emotional distress tort liability based upon peaceful religious practices by permitting juries to determine that such practices constitute "coercive persuasion" and are "outrageous conduct"?

2. Whether an appellate court is required to reverse a jury's general verdict against a church for intentional infliction of emotional distress, where the underlying claims presented to the jury included religious practices protected by the free exercise clause as well as purported acts which may be unprotected, and where the jury's verdict therefore may have rested upon grounds improper under the First Amendment?

3. Whether an appellate court must engage in an independent review of the record where a judgment is based upon activity ordinarily protected under the free exercise clause, and where there exist contextual factual issues which would determine whether the activity may be stripped of constitutional protection?

4. Whether the First and Fourteenth Amendments prohibit an award of punitive damages against a church for providing its central peaceful religious practices to a parishioner?

5. Whether California's failure to establish and enforce clearly defined standards for the award of punitive damages violates the due process clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 28.1 LIST

The parties to the proceedings below were:

The Church of Scientology of California
Larry Wollersheim.

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The Church of Scientology of California petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District.

OPINIONS BELOW

The order of the Supreme Court of the State of California denying a petition for review is unreported (1a).[1] The opinion and judgment of the California Court of Appeal, Second Appellate District (5a-44a), is reported at 212 Cal.App.3d 872, 260 Cal.Rptr. 331 (1989). The order of the Court of Appeal modifying that opinion and denying rehearing (2a-4a) has been certified for publication. The order of the Superior Court of Los Angeles County, State of California, denying, without opinion, motions for a new trial and a judgment notwithstanding the verdict (45a-46a) is not reported. The orders of the Superior Court summarily adjudicating that Scientology is a religion and otherwise denying the Church's motion for summary judgment (53a-56a), and granting in part the Church's motions *in limine* (47a-52a), are unreported.

JURISDICTION

The judgment of the California Court of Appeal modifying in part, affirming in part, and reversing in part the judgment of the Superior Court was filed on July 18, 1989 (5a). The court of appeal denied petitioner's timely petition for rehearing on August 17, 1989 (2a). On October 26, 1989, the Supreme Court of California denied petitioner's timely petition for review (1a). On January 17, 1990, Justice O'Connor

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1 References to "_____a" are to the Appendices to this petition. Citations to "RT_____" are to the Reporters Transcript, numbered A1 to A1009 for pretrial proceedings, and 1 to 15,311 for trial and post-trial proceedings. References to "App. A_____" are to pages in the Appellant's Appendix in Lieu of Clerk's Transcript, filed in the Court of Appeal.

extended the time for filing a petition for a writ of certiorari to and including February 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this action, respondent Wollersheim, a former member of the Church of Scientology of California ("the Church"), sued the Church primarily on the theory that his voluntary participation in the Church's central and peaceful religious practice of auditing caused him severe emotional distress, and that the practice constituted "outrageous conduct". The jury returned a verdict of $30,000,000, which was reduced by the California Court of Appeal to $2,500,000. The court of appeal otherwise affirmed the judgment on the ground that there was evidence in the record to show that Wollersheim's participation in Scientology religious practices was coerced by physical force or threats of secular retribution. This theory not only was never presented or argued at trial, but directly contradicted Wollersheim's own testimony and theory of the case, which was that he had become "addicted" to auditing. The decision of the court of appeal, which refused to engage in the scope of review mandated in First Amendment cases, and which ignored the indisputable fact that massive damages

were imposed upon a religious organization for its constitutionally protected peaceful religious practices, poses a substantial threat to the free exercise of religion of minority religious organizations and their members.

1. Wollersheim was a member of the religion of Scientology from 1969 until 1979, during which time he intermittently participated in Scientology religious practices, including its central practice of auditing (6a-7a).[2] He initiated this action on July 28, 1980.

Wollersheim's second amended complaint alleged four causes of action (App. A1-20): (1) fraud, in inducing Wollersheim to engage in auditing; (2) fraud, in failing to disclose the purportedly "experimental" and "dangerous" nature of auditing; (3) intentional infliction of emotional distress by outrageous conduct in: (a) providing auditing to Wollersheim; (b) purportedly urging Wollersheim to sever ties or "disconnect" from certain family members; (c) a purported unauthorized disclosure of confidential material from Wollersheim's auditing records; and (d) an alleged effort to destroy Wollersheim's business in mid-1979 by means of a church-ordered boycott, pursuant to a purported Church policy called "fair game"; and (4) negligent infliction of emotional distress in the provision of auditing to Wollersheim.

Wollersheim's two fraud counts were nonsuited at the conclusion of his case (RT 8106, 8118) and the court of appeal reversed the jury verdict finding negligent infliction of emotional distress (34a-36a). Wollersheim took no appeal from these rulings. Petitioner describes below the proceedings and facts with respect to Wollersheim's intentional infliction of emotional distress claim, with particular emphasis on the

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2 Auditing consists of a parishioner and auditor sitting in a room while the auditor asks a series of questions to which the parishioner responds (RT 1991-92, 8335-36). The purpose of auditing is to unburden a person of spiritually painful experiences, both in present and past lifetimes, and to orient a person as a spiritual being (App. A49-50, A59; RT 8335-36, 8364); (22a-23a). The core religious beliefs of Scientology and the nature of auditing are described in *Hernandez* v. *C.I.R.*, 109 S.Ct. 2136, 2141 & n.2 (1989). Wollersheim presented *no* evidence showing that auditing was anything other than the peaceful, deliberative process described above.

auditing element of the claim, which was by far the primary focus of Wollersheim's case.

2. On June 14, 1985, after a hearing, the trial court summarily adjudicated that Scientology is a religion, stating that: "The supporting documents for the proposition that Scientology is a religion do more than make a *prima facie* case; they make a strong case." (53a-54a; *see* 55a-56a).[3]

The trial court subsequently ruled that auditing was the central religious practice of Scientology and that the following would not be subjects of inquiry at trial: (1) the Church's belief in and practice of auditing; (2) representations with respect to the benefits, nature or efficacy of auditing; and (3) evidence of the alleged successes or failures of auditing (RT A480; 48a, 51a).

At trial, however, a different judge ruled that Wollersheim could present evidence of the effect of auditing upon him and the truth or falsity of representations about the benefits he might receive from auditing (RT 100, 105-06, 114). The court justified its ruling on its contention that "[b]eliefs are protected, but acts are not" (RT 84).

Wollersheim placed his greatest emphasis at trial on his claims that his participation in auditing caused him severe emotional distress. His theory was that (1) he became dependent upon, indeed, "addicted" to auditing, believing it was necessary to his physical and spiritual survival (this process was denominated "thought reform" or "brainwashing" by Wollersheim's expert witness, psychologist Margaret Singer (9a)); and (2) the provision of auditing to Wollersheim, *per se*, caused him severe emotional harm and constituted outrageous conduct (Complaint, App. A6-8; A10-13; RT 606, 632-33).

Thus, in his opening statement, Wollersheim's counsel emphasized that Wollersheim came to believe in the value of auditing and *wanted* to undertake it (RT 637-38, 650, 652). Similarly, Wollersheim's counsel, in explaining his theory of

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3 The court rejected the Church's contentions in its summary judgment motion that each of Wollersheim's claims were barred by the First Amendment. (App. A38-41; 56a).

recovery to the court, stated that Wollersheim had, in effect, been seduced into undergoing auditing and that he wished to show "the [purportedly negative] effect that the [upper level auditing] materials had on Mr. Wollersheim" (RT 2140-41). The testimony of Wollersheim and his expert witnesses was consistent with this theory, and clearly demonstrated that he participated in auditing because he wanted to, or because, in his own words, he was "addicted" to it and that "he wanted to do everything," *i.e.*, all levels of auditing. (RT 6159-61, 4837; *see* RT 5322 (he felt an "urgency" to undergo auditing), 2508 (he told Singer that auditing "was my last hope and I had to believe or be trapped forever")[4], 4790-93, 4805-08, 4836-38, 4844-47, 4877-79, 4888-93, 5025-26, 5190-91, 5197-99, 5302, 6178).

Wollersheim's lengthy testimony that his participation in auditing caused him great emotional distress was supported by Singer, his star expert witness. Singer, over continuing objections, characterized the lower levels of auditing as part of a system of thought reform (*e.g.*, RT 2414-15, 2343-45, 2606, 5012-13), and characterized the upper levels of auditing as "freaking experiments," and responsible for the destruction of all values (RT 2193-95, 2240-42, 2475-78, 5048-50, 13,897). Singer described five "cataclysmic" events experienced by Wollersheim, which purportedly activated a preexisting manic-depressive condition (RT 2155-56); four of these events were auditing experiences. As a result of these experiences, Singer stated that Wollersheim suffered the emotional distress which was the subject of the case (RT 2156-57, 2241-42, 2562-64).

In closing argument, Wollersheim's counsel placed his greatest emphasis on the auditing allegations, and never argued that Wollersheim was, or felt threatened, to participate in auditing. He asserted that auditing "precipitated Wollersheim's genetic precondition to a full-blown symptomatic mental disease called bipolar disorder" (RT 14,403, 14,713; *see also* RT 14,467, 14,490-93, 14,762).

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4 Scientologists believe that a person is trapped forever in a spiritual vacuum unless he or she is released through the spiritual practice of auditing. App. A49; *see* n.2, *supra*.

At no time in this six-month trial did Wollersheim, Singer or any other witness testify, nor did his counsel argue, that Wollersheim ever participated in auditing because of physical coercion or secular threats of retribution by the Church, actual or implied.[5]

The trial court instructed the jury that Scientology is a religion, that auditing is its central religious practice, and that the verdict could not be based on the *validity* of religious beliefs and practices (RT 14,778). It refused, however, to give instructions, requested by the Church, that the jury could not award damages based upon "the plaintiff's participation in auditing or . . . any of the other religious practices of the Church" (App. A312), or "evaluate the potential . . . harmfulness of religious . . . practices" (App. A309-1) or consider "the effectiveness or desirability of auditing" (App. A305). Thus, the jury was permitted to base its verdict on harms purportedly caused by Wollersheim's voluntary participation in auditing.

3. As noted above, Wollersheim also alleged other acts in support of his single, unified intentional infliction of emotional distress claim. With respect to his allegation that he was induced to "disconnect" from his first wife and his father, the evidence showed: (1) that after his first wife tried to stab him in the course of a domestic argument, various Scientologists suggested that he should "get away" from her or that he "would be best away from her" (RT 4973-75); that he nevertheless stayed with her because he "grew to love her" (RT 4977); but that he ultimately divorced her; (2) that he had a poor relationship with his father prior to being involved in Scientology, and that the Church required him to attempt to "work things out" with his family and visit his father (RT 3578, 6638; Ex. 289). Wollersheim claimed that

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5 Wollersheim last received auditing in June, 1979 in Florida (RT 5227). He testified that he stopped further auditing because he felt emotionally stressed, panicky, and suicidal. He testified that when he left Florida, "I sincerely believed they would leave me alone, and just let me alone . . . I believed that they were basically, you know, my friends and good people and they wouldn't forget that" (RT 5382, 5389), *i.e.*, at that time he had no fear of retribution from the Church if he stopped auditing.

the Church merely intended that he work out a superficially friendly relationship with his father, without meaningful content. The trial court refused to instruct the jury that a Church's application of a "disconnect" or "shunning" policy to its membership is protected by the First Amendment.

With respect to Wollersheim's claim that the Church attempted to destroy his business pursuant to an alleged policy of "fair game", Wollersheim testified that Scientologists ceased working for him or doing business with him in May, June and July of 1979, and that they refused to pay debts to his factor (RT 7837, 5270-01, 5281, 5351-52). The Church denied the claim, but also sought an instruction that a Church-ordered boycott of plaintiff's business was not actionable (App. A314), which was denied (RT 14,394).[6]

4. The jury returned a verdict for $5,000,000 in compensatory and $25,000,000 in punitive damages. The trial court denied without comment the Church's motions for new trial and judgment notwithstanding the verdict (45a), which, *inter alia*, challenged the verdict and the punitive damage award on First Amendment grounds.

5. On appeal, the Church raised each of the issues presented herein.[7] The court of appeal affirmed the judgment as to liability on the claim of intentional infliction of emotional distress, reversed the judgment on the claim of negligent infliction of emotional distress, and reduced the damage awards to $500,000 in compensatory damages and $2,000,000 in punitive damages (43a-44a).

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6 As to the claim of disclosure of confidential information, the only evidence was Wollersheim's testimony that several members of the Church of Scientology Celebrity Center of Los Angeles told him in June 1976 (over four years prior to the filing of the lawsuit) that they had reviewed his auditing folders (RT 5153-55). Wollersheim's counsel never even addressed this claim in his closing argument to the jury.

7 The issue that the appellate courts must engage in an independent review of the entire record in this First Amendment case did not arise until after the court of appeal's decision, as discussed, n.20, *infra*, and was raised in the Petition for Rehearing and the Petition for Review.

The court held that auditing is a religious practice that ordinarily constitutes protected activity under the First Amendment, and cannot be made actionable by the state even if it results in severe emotional distress (23a-24a). The court held that the auditing at issue in this case, however, was not constitutionally protected because it found that evidence existed in the record from which the jury could have concluded that Wollersheim did not participate in auditing voluntarily, but rather was coerced into it by physical force and secular threats (24a-25a), a theory never advanced by Wollersheim or presented to the jury as the predicate by which it could render a verdict on behalf of Wollersheim.

The court of appeal identified three bases for its finding that Wollersheim was coerced into participating in auditing: (1) Wollersheim feared that he would be subject to a purported church policy of retribution called "fair game" if he did not participate in auditing; (2) Wollersheim feared that he would have to pay a "freeloader debt" if he did not participate in auditing; and (3) Wollersheim was subjected to physical restraint on one occasion when he attempted to leave the RPF[8] in 1974 (25a-27a). Not only did the court of appeal fail to identify any evidence which supported its new theory that Wollersheim participated in auditing because of such coercion,[9] but it ignored the testimony of Wollersheim and his

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8 In the fall of 1974, Wollersheim committed acts that were deemed to violate Church ethics policy (RT 9313-16). Wollersheim was given the choice of leaving staff entirely, or participating in the "Rehabilitation Project Force" (RPF), the purpose of which was spiritual rehabilitation (RT 9319). The program included study, counseling, and manual labor (RT 4683-84). Wollersheim accepted the offer of physical work and spiritual rehabilitation (Exs. 267, 273). At trial he testified to hard manual labor, dirty conditions, lack of food, and being "a broken man" as a result of his six weeks on the program (27a; RT 5021-22).

9 With respect to "fair game", the Church disputed that any such policy of retribution existed. In any event, though, Wollersheim simply did not testify that he was coerced to audit because he was afraid of "fair game", and there was no evidence that he ever was threatened with "fair game" or retribution if he were to cease auditing. Indeed, he testified that when he

experts that Wollersheim volunteered and even pleaded for auditing, not that he was threatened into taking auditing.

The court applied the same "coercion" theory and the same method of review to the "disconnect" claim. The court acknowledged that there is a substantial question as to whether a policy of "disconnection" or "shunning" is constitutionally protected (32a). It held, however, that Wollersheim was "coerced" into shunning his family, and that therefore the practice was not protected by the First Amendment (32a-33a).

The court of appeal did not even address the Church's arguments that the imposition of punitive damages against the Church for providing its central religious practice violates the First Amendment, that the standardless determination of

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stopped auditing and left the Church in 1979, "I sincerely believed they would leave me alone . . . I believed that they were basically, you know, my friends and good people and they wouldn't forget that" (RT 5382).

According to the undisputed testimony, a "freeloader debt" is a bill submitted to a church staff member who, pursuant to his employment contract, receives free religious courses or auditing, but then fails to perform the employment agreed upon; it is *not* imposed because of a failure to take auditing (RT 4889-89, 7534-36, 13,255). Indeed, as Wollersheim testified, if a freeloader bill is outstanding, the person *cannot* take auditing. Only *after* Wollersheim paid his freeloader debt in 1976, was he permitted to resume auditing, which is what he wanted to do so much that he paid money for it thereafter (RT 5159-60, 6233-34). Indeed, *all* of Wollersheim's auditing during his first three and last three years in Scientology was undertaken when he was not a staff member, and not subject to a potential freeloader debt. The court of appeal completely misinterpreted "Freeloader debt," and there is absolutely no evidentiary support for its conclusion that Wollersheim undertook auditing for fear of incurring a "freeloader debt" (26a).

Finally, with respect to the "physical restraint" incident, Wollersheim testified that at one point when he was on the RPF in 1974, he attempted to leave. He was confronted by three Scientologists, who applied to him what he called "8C," which he described as follows: "They will use just enough force to restrain you according to the amount of force you exert" (RT 5018). According to Wollersheim, one of the three said to him, "Look, you can still go after we talk. Let's just take a little time and talk" (RT 5019). Wollersheim agreed to talk, and after "half an hour to an hour" agreed to go back to the RPF. *Id.* There is no testimony that he stayed against his will, or that he felt coerced to audit at any time as a result of that single brief incident.

punitive damages violates constitutional due process, and even that the trial court improperly refused to instruct the jury on the statutory standard for imposing punitive damages on a corporate defendant.

The court of appeal found the jury's imposition of $5,000,000 in compensatory damages was so grossly excessive as to suggest "prejudice or passion" (41a), and that the award of $25,000,000 in punitive damages was "preposterous" (43a). Rather than concluding that a new trial was required, the court, without further explanation, reduced the damage awards by over ninety per cent, to $500,000 compensatory damages and $2,000,000 punitive damages (41a-43a).

Petitions for rehearing by both sides were denied on August 17, 1989 (2a). The only substantive modification in the opinion made by the court was to eliminate the word "preposterous" from its opinion (3a).

Petitions for review by both parties to the Supreme Court of California, in which the Church raised all the issues presented herein, were denied on October 26, 1989 (1a).

Petitioner emphasizes that Wollersheim also recognized that the court of appeal's "coercion" theory was wholly unrelated to his case. Thus, in his petition for review, Wollersheim asserted error by the court of appeal:

> the "auditing" as designed and implemented by Scientology was an integral, essential component of Scientology's "thought reform" program and was used primarily to subjugate the will and control the mind.
>
> * * *
>
> Under Wollersheim's evidence and theory of the case, there was no such phenomenon as "voluntary auditing".
>
> * * *
>
> *Indeed, under Wollersheim's theory of the case and evidence, "auditing" was, by its very nature and function, coercive.* Therefore, the Decision in that respect runs directly contrary to the evidence when construed to support the judgment.

Petition for Review of Wollersheim, at 8-10 (emphasis added).

REASONS FOR GRANTING THE PETITION

In recent years, the lower state and federal courts have been inundated with a flood of litigation brought by former members of minority religions based upon peaceful and voluntary religious practices. The state of the law in this highly sensitive First Amendment area is, to put it bluntly, in chaos. While some courts have refused to permit tort liability based on peaceful religious practices, or "thought reform" theories, a disturbing number of courts, including the trial court below, have permitted plaintiffs, in effect, to put their former religions on trial for causing severe emotional distress through "outrageous," yet peaceful and voluntary religious practices. And many appellate courts, including the court below, have provided lip service to substantive First Amendment doctrine protecting the free exercise of religion, but have utterly abdicated their appellate responsibility—exercised in other First Amendment contexts such as libel, obscenity, and seditious speech—of ensuring that substantive constitutional protections are made meaningful through searching appellate review.

This case presents, in dramatic form, all the elements of the chaotic failure of the lower courts in this country—and particularly in California—to protect the religious liberties of newer and unorthodox religious societies.

At the trial level, the Church was subjected to what can only be characterized as a six-month heresy trial, in which its central religious practice of auditing was made the centerpiece of a claim for intentional infliction of emotional distress, and for which an inflamed jury imposed $30,000,000 in damages.

In affirming the judgment, the California Court of Appeal failed to follow any of the rules of appellate review mandated in a case involving activity presumptively within the zone of First Amendment protection. While acknowledging that the Church's peaceful religious practice of auditing ordinarily would be constitutionally protected, the court held that the Church's First Amendment protection for providing auditing could be "stripped away" (18a) because there purportedly was some evidence which would have justified the jury in

concluding that this plaintiff's participation in the religious practice was coerced by physical force or secular threats. The court's affirmance on this ground came despite the fact that the court's coercion theory was directly contrary to the theory of recovery urged by the plaintiff, despite the fact that it was belied by plaintiff's own testimony, and despite the fact that the plaintiff never requested and the court never gave instructions which would have directed—let alone limited—the jury to such a theory for "stripp[ing] away" First Amendment protection from religious practices.

In other First Amendment contexts, this Court has emphasized two fundamental rules of appellate review: (1) a general verdict must be reversed where it *may* have rested upon unconstitutional grounds, even assuming there was evidence to support the verdict on a constitutionally permissible ground; (2) where there is a question whether First Amendment protection may be withdrawn from otherwise protected speech because of the particular factual context surrounding the speech, an appellate court must engage in an independent review of the evidence of the purported factual context justifying the withdrawal of constitutional protection.

These two rules are interrelated, and serve a common purpose. They help insure that out of the complex maelstrom of a jury trial, no one is subjected to liability because he chose to exercise his fundamental rights under the First Amendment. Application of such rules of appellate review compels litigants and trial courts to limit the claims presented to juries to those permitted by the First Amendment, and to make clear to juries through precise instructions that they cannot impose judgments based upon protected activities.

The court below, like many appellate courts, utterly failed to apply these rules to a case involving religious free exercise. That failure can only encourage the growing trend of apostate church members filing overbroad tort claims based upon religious practices, knowing that juries are likely to become inflamed upon hearing evidence of "strange" and purportedly emotionally stressful practices and that trial and appellate courts are likely to continue to uphold resulting inflated jury verdicts, at least if they can find some evidence in the

record of secular fraud or coercion. Certiorari should be granted to make clear the proper constitutional limits on the trial of claims brought on the basis of religious practices, and how appellate courts must review such cases.

I. This case raises the recurring fundamental question, upon which the lower courts are in conflict and disarray, whether tort liability may be founded upon voluntary participation in peaceful religious practices.

It is indisputable—in fact Wollersheim agreed in his petition for review to the California Supreme Court—that this case was tried upon the theory that the Church's provision to Wollersheim of the peaceful religious practice of auditing was itself actionable as "outrageous conduct". Wollersheim claimed that his initial exposure to auditing caused him to become "psychologically dependent" upon and "addicted" to the practice, and that he thus continued to participate in it despite the fact that it purportedly caused him severe emotional distress. The jury was invited to and did assess millions of dollars in damages based upon a conclusion that plaintiff's participation in auditing was "outrageous".

The trial of this case thus directly raises the question whether the state may draw the line between protected and unprotected peaceful religious practices through the subjective application by juries of the concept of "outrageous conduct". To allow juries to impose damages arising from voluntary participation in peaceful religious practices, based on a subjective "outrageousness" standard, would directly impede the free exercise of religion. No church could "free[ly] exercise" its religion under the threat of such inquiry and judgment, particularly in light of the huge awards juries are wont to impose that may cripple or destroy minority religions.[10] Adjudication of such disputes "would

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10 In addition to the $30 million jury verdict here, recent jury verdicts have included the following: (1) $39 million in *Christofferson* v. *Church of Scientology*, No. A770405184 (Multnomah Cty. 1985), overturned by the trial court on a motion for mistrial; (2) $32 million in *George* v. *ISKCON of*

. . . declare open season on churches and their followers." L. Tribe, *American Constitutional Law* 1235 (2d ed. 1988).

In *Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988), this Court held that a highly offensive parody of a public figure could not be actionable under a claim of intentional infliction of emotional distress. The Court concluded that there was no "principled standard" to separate the parody from more traditional political cartoons in terms of constitutional protection, *id.* at 55, and stated that, "we are quite sure that the pejorative description 'outrageous' does not supply one," *id.*

The Court's fear that the "inherent subjectiveness" of the term "outrageousness" "would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression," *id.*, is even more apt where religious belief and practice are at issue. Religious beliefs tend to be among the most strongly held and exclusive points of view, and they uniquely engender controversy, hostility, rivalry and prejudice. It is objectively unreasonable to expect that jurors will be able to put aside their own sacred beliefs and biases when confronted with opposing or novel religious claims, especially given the well-known history of public opprobrium for unconventional religious societies. *See e.g.*, *Everson* v. *Board of Education*, 330 U.S. 1, 8-14 (1947); *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 116 (1943). Certainly, the "pejorative description 'outrageous' does not supply" the principled standard to distinguish constitutional from unconstitutional peaceful religious practices, any more than in the realm of free speech. Just as *Falwell* rejected tort liability for *emotional* injury

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California, 213 Cal.App.3d 729, 262 Cal.Rptr. 217 (1989), *opinion decertified* (Cal.S.Ct. Nov. 30, 1989), *reported in* Cal. Law Weekly at 79, 265 Cal.Rptr.No.3 (Feb.2, 1990), reduced to over $11 million by the trial court, and further reduced to $3 million on appeal; (3) $1,563,000 in *Mull* v. *Church Universal & Triumphant, Inc.*, No. C358191 (L.A. Sup.Ct. 1986), *aff'd*, No. B021187 (Cal.Ct.App. 1989), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990); (4) $1,000,000 in *O'Neil* v. *Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986), reduced on appeal to $250,000; (5) $390,000 against a local congregational church in *Guinn* v. *Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989), reversed and remanded on appeal.

from political speech, the First Amendment forbids recovery for emotional injury caused by voluntary participation in peaceful religious practices.

The question whether ex-members may recover for intangible or emotional distress torts arising out of peaceful and voluntary religious practices continues to arise with increasing frequency in the lower courts, with inconsistent results. Those courts which have rejected such claims have recognized that the free exercise clause must and does protect peaceful religious practices, particularly with respect to the relationship between a church and a member or ex-member.[11] Other courts, however, like the court below, have held that such claims may be actionable, at least in certain circumstances.[12]

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11 *See, e.g., Paul* v. *Watchtower Bible and Tract Society*, 819 F.2d 875, 880, 883 (9th Cir.) (holding that the Jehovah's Witnesses could not be held liable for intentional infliction of emotional distress and other "intangible emotional torts" for the religious practice of "shunning"), *cert. denied*, 484 U.S. 926 (1987); *Orlando* v. *Alamo*, 646 F.2d 1288, 1290 (8th Cir. 1981) (Church's indoctrination program not actionable); *Van Schaik* v. *Church of Scientology*, 535 F.Supp. 1125, 1139 (D.Mass. 1982) (exhortation by Church "to sever family and marital ties and to depend solely on the Church for emotional support" does not support a claim for intentional infliction of emotional distress); *Baumgartner* v. *First Church of Christ, Scientist*, 141 Ill.App.3d 898, 490 N.E.2d 1319, 1326, *cert. denied*, 479 U.S. 915 (1986); *Rasmussen* v. *Bennett*, 228 Mont. 106, 741 P.2d 755 (1987); *Christofferson* v. *Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, 590, *pet. denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied*, 459 U.S. 1206 (1983); *Radecki* v. *Schuckardt*, 50 Ohio App.2d 92, 361 N.E.2d 543, 544 (1976); *Bradesku* v. *Antion*, 21 Ohio App.2d 67, 255 N.E.2d 265, 269 (1969).

12 *See, e.g., Molko* v. *Holy Spirit Association*, 46 Cal.3d 1092, 1120, 1123-24, 252 Cal.Rptr. 122, 762 P.2d 46 (1988) (threats of "divine retribution" cannot state a claim for intentional infliction of emotional distress or false imprisonment, although misrepresentation and concealment of the church's identity for the purpose of inducing plaintiffs unknowingly to submit to the Church's practices may state an emotional distress claim), *cert. denied*, 109 S.Ct. 2110 (1989); *In re The Bible Speaks (Dovydenas)*, 869 F.2d 628, 645 (1st Cir.) (allowing undue influence claim for purportedly solely secular misrepresentation by religious organization to obtain funds from member), *cert. denied*, 110 S.Ct. 67 (1989); *Bear* v. *Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105, 107-08 (1975) (suggesting that shunning "may be excessive interference within areas of paramount state concern"); *Hester* v.

And some courts have found the claims to be actionable, on the basis of harms caused, at least in part, by religious practices or religiously-motivated speech or conduct.[13] These issues are pending in numerous cases throughout the country.

Nor can Dr. Singer's theory of "thought reform" or "coercive persuasion" remove the constitutional protection accorded peaceful religious practices.[14] There is simply no principled way by which a court may draw the distinction, within the confines of the First Amendment, between the religious convert who is "legitimately" persuaded by the beliefs and practices of one religion from the convert who is "illegitimately" or "outrageously" persuaded by the beliefs and practices of another. *See Hustler Magazine* v. *Falwell*, 485 U.S. at 55-56. The notion that individuals may be so easily "coerced" by peaceful religious practices into becoming "deployable agents" of a religion is contrary to the very con-

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Barnett, 723 S.W.2d 544, 555, 560 (Mo.App. 1987) (no alienation of affection claim for "preachment of doctrine or advocacy of religious faith"; but "use of the pulpit as the pretext for the practice of religion, but as the occasion for intentional defamation" is actionable); *Madsen* v. *Erwin*, 395 Mass. 715, 481 N.E.2d 1160, 1167 (1985) (dismissing emotional distress claims, but allowing repleading); *Guinn* v. *Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) (First Amendment prohibits tort liability for ecclesiastical discipline imposed upon member, but not for discipline imposed after member withdraws from Church).

13 *See, e.g., Witt* v. *Church Universal & Triumphant, Inc.*, No. B021187 (Cal.App. 1989) (prayers and threats of divine retribution designed to elicit donations of money held to be actionable as outrageous conduct), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990); *O'Neil* v. *Schuckardt*, 112 Idaho 472, 733 P.2d 693, 699-701 (1986) (intensive prayer, fasting, and isolation from community held to be actionable); *Carrieri* v. *Bush*, 69 Wash.2d 536, 419 P.2d 132, 135-37 (Wash. 1966) (threats of damnation, along with ill will and "reckless" recommendations of family separation based upon biblical interpretations renders pastor liable for alienation of affections.

14 The "coercive persuasion" theory presented in this case is wholly independent of any claim of physical violence, restraint, or threats. Indeed, Dr. Singer did not rely at all on the one incident of purported "restraint" in 1974 upon which the court of appeal placed so much emphasis. Rather, according to Singer, the "thought reform" was carried out through auditing itself and other Scientology religious practices.

cept of a democratic society based on decisions made by individuals with free will, which is the fundamental predicate of the First Amendment. If individuals are so easily subject to "thought reform," then the concepts of individual choice and autonomy—upon which both the "free exercise" and "free speech" clauses of the First Amendment are premised—are meaningless platitudes. *See, e.g., Cohen* v. *California*, 403 U.S. 15, 24 (1971) (First Amendment removes governmental restraints from arena of public discussion "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests"); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 Harv.L.Rev. 603, 630-31 & nn.161-62, 634 (1990) (discussing the "strong 'intellectual individualism' that characterizes first amendment doctrine," which "is linked to the innermost logic of democracy . . . . democracy must at root presuppose citizens autonomous enough to create, rather than be created by, their communities").

Indeed, even the terminology of this new tort theory—"coercive pursuasion"—is in fundamental conflict with this Court's First Amendment jurisprudence. In *NAACP* v. *Claiborne Hardware*, 458 U.S. 886 (1982), this Court used virtually identical language to describe the *protected* actions of the defendants therein. They "sought to *persuade*" through non-violent " 'threat[s]' " that may have "coerce[d]" others into action. 458 U.S. at 910 (emphasis added); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment"); *cf. United States* v. *Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 2760-63 (1988) (involuntary servitude under Thirteenth Amendment and 18 U.S.C. § 1584 requires use or threatened use of physical or legal coercion, not psychological coercion).

Most courts which have addressed the question have held that a religious organization cannot be liable in tort for such a claim, because to do so would not only impose liability for

religious practices that do not justify government regulation, but also because judicial scrutiny of a religion's persuasiveness inevitably would involve scrutiny of the validity or credibility of a religion's dogma.[15] Indeed, at least three lower appellate courts in California expressly held that jury evaluation of claims of coercion persuasion or brainwashing inevitably results in jury evaluation of the believability or "truth" of the underlying religious beliefs, in violation of the principles of *United States* v. *Ballard*, 322 U.S. 78 (1944).[16]

Not all courts, however, have adopted this constitutionally necessary analysis. In *Molko*, *supra*, the California Supreme Court, in reversing the court of appeal, concluded that the "brainwashing" claim did raise a *triable* issue of fact, at least in the unique circumstances of that case. *Molko*, 46 Cal.3d at 1110-11, 1122. *Molko*, standing alone, arguably was based on the limited theory presented by the facts of that case that "fraudulent inducement [by concealing the Church's identity] into an atmosphere of coercive persuasion—the conduct at issue—is extreme and outrageous." *Molko*, 46 Cal.3d at 1122. The *Molko* court did not explicitly hold that "coercive persuasion" itself, without the secular fraud, would state an emotional distress claim. 46 Cal.3d at 1122.[17]

Recent actions of the California Supreme Court, however, including in this case, strongly suggest that that Court indeed

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15 *See Meroni* v. *Holy Spirit Association*, 119 A.D.2d 200, 506 N.Y.S.2d 174, 177 (1986); *Lewis* v. *Holy Spirit Ass'n*, 589 F.Supp. 10, 12 (D.Mass. 1983); *Turner* v. *Unification Church*, 473 F.Supp. 367, 371 (D.R.I. 1978), aff'd, 602 F.2d 458 (1st Cir. 1979); *George*, *supra*, 262 Cal.Rptr. at 236; *Katz* v. *Superior Court*, 73 Cal.App.3d 952, 141 Cal.Rptr. 234, 255 (1977); *Guardianship of Polin*, 675 P.2d 1013 (Okla. 1983), *cert. denied*, 469 U.S. 850 (1984); *Baumgartner*, *supra*, 490 N.E.2d at 1326; *Christofferson*, *supra*, 644 P.2d at 590-91.

16 See *Katz*, *supra*, 73 Cal.App.3d at 987; *Estate of Supple*, 247 Cal.App.2d 410, 415, 55 Cal.Rptr. 542 (1966), *cert. denied*, 389 U.S. 820 (1967); *Molko* v. *Holy Spirit Association*, 179 Cal.App.3d 450, 224 Cal.Rptr. 817, 828 (1986), *reversed*, 46 Cal.3d 1092 (1988), *cert. denied*, 109 S.Ct. 67 (1989).

17 No such issue of fraudulent concealment of the Church's identity is at issue here.

construes *Molko* as creating a jury question as to whether claims of coercive persuasion are actionable as outrageous conduct. In *George* v. *International Society for Krishna Consciousness of California*, 213 Cal.App.3d 729, 262 Cal.Rptr. 217, 236-37 (1989) (softbound edition), the California Court of Appeal, Fourth District, reversed a multi-million dollar emotional distress judgment on behalf of an ex-member, which had been based in large part on the "coercive persuasion" testimony of Singer. The court of appeal narrowly construed *Molko*, holding that "[t]ort liability based on dietary restrictions, *methods of worship*, and communal living arrangements and schedules is just as surely inimical to the free exercise of religious liberty as that based on threats of divine retribution." 262 Cal.Rptr. at 236 (emphasis added).

The attempt of the *George* court to limit *Molko* to its facts, however, has been blocked by the California Supreme Court, which has just decertified *George* as precedent. *See Cal. Law Weekly* at 79, *reported in* 265 Cal.Rptr. No. 3 (Feb. 2, 1990). When combined with the California Supreme Court's refusal to review the decisions in this case, in *Witt* v. *Church Universal & Triumphant, Inc.*, No. B021187 (Cal. Ct.App. 1989), *rev. denied*, No. S010386 (Cal.S.Ct. June 28, 1989), *cert. denied*, 58 U.S.L.W. 3449 (Jan. 16, 1990), and in the *George* case itself, the message to California lower courts is inescapable: claims that the peaceful religious practices and indoctrination techniques of unorthodox religions constitute coercive persuasion and outrageous conduct may be resolved by juries, without constitutional limitation, *just as they were in the instant case.*

Nor is California alone in striking out on this dangerous road to state-sanctioned religious intolerance. In *O'Neil* v. *Schuckardt*, 112 Idaho 472, 733 P.2d 693, 699-701 (1986), the Idaho Supreme Court held that evidence of "rigid [religious] indoctrination", including "long hours in prayer, often kneeling", fasting, and isolation from outside communications, presented a jury question as to whether a conservative schismatic Catholic church engaged in "behavior [which] was intentional, wrongful, and an intrusion [of privacy]." *Id.* at 700. Not surprisingly, the jury found that the actions were

tortious, and the Idaho Supreme Court upheld the verdict. In *Carrieri* v. *Bush*, *supra*, the Washington Supreme Court held that a jury could find—as it did—that peaceful religious teachings and practices constitute the tort of alienation of affections.[18] *See also Peterson* v. *Sorlien*, 299 N.W.2d 123, 129 (Minn. 1980) ("cult indoctrination, viewed in a light most favorable to the prevailing party, is predicated on a strategy of coercive persuasion that undermines the capacity for informed consent"), *cert. denied*, 450 U.S. 1031 (1981).

This Court has never reviewed a case involving a church's tort liability for the church's peaceful religious practices. The Court should grant certiorari to insure that proper constitutional standards are applied and to make clear that, just as with political speech, juries should not be permitted to draw the line between protected and unprotected religious practice by application of the vague and uncertain standard of "outrageous conduct". *Hustler Magazine* v. *Falwell*, *supra*.

II. The decision of the Court of Appeal is in fundamental conflict with the decisions of this court and other appellate courts holding that a judgment must be reversed where it may have rested upon grounds impermissible under the first amendment.

The court of appeal recognized that the judgment would be barred by the First Amendment if it rested upon the theory that auditing, *per se*, constituted outrageous conduct (which, of course, was precisely the plaintiff's theory): "[The Constitution] cannot tolerate lawsuits which might chill religious practices—*such as auditing*, 'hell fire and damnation' preaching, confessions and the like—where the only harm which occurs is emotional injury to the psychologically weak." (24a) (emphasis added).

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18 The rules of the California, Idaho and Washington state courts thus are in direct conflict with the rule of the United States Court of Appeals for the Ninth Circuit, as stated in *Paul* v. *Watchtower Bible and Tract Society*, 819 F.2d at 880, 883: "[i]ntangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members".

The court of appeal did not deny that the "auditing *per se*" theory was presented to the jury, or that it, at the least, may have been the basis for the jury's verdict. Indeed, the court of appeal ignored the fact that the Church sought a jury instruction that auditing, *per se*, could not be the basis for a finding of tortious conduct, and that the instruction was refused (App. A305, 309-10, 312). Rather, the court of appeal found that there was evidence from which the jury *could* have based its verdict on the ground that plaintiff was compelled by force or secular threats to participate in auditing (25a). The court affirmed the judgment exclusively upon the possibility that the jury's verdict rested on such a secular coercion theory, despite the fact that the jury was not instructed on such a theory.

The court of appeal thus turned upside down the rule uniformly applied in First Amendment speech cases requiring reversal of a general verdict if the verdict may have rested upon grounds protected by the First Amendment. *See, e.g., Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *Gregory* v. *City of Chicago*, 394 U.S. 111, 113 (1969); *id.* at 123-124 (Black, J., concurring); *Street* v. *New York*, 394 U.S. 576, 586-590 (1969); *Thomas* v. *Collins*, 323 U.S. 516, 528-29 (1945).

The Court explicitly applied this rule to state court civil tort proceedings in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 289 (1964); *see also United Mine Workers* v. *Gibbs*, 383 U.S. 715, 732-35 (1966); *NAACP* v. *Claiborne Hardware, Co.*, 458 U.S. 886, 917-18 (1982). And other lower federal and state appellate courts have applied the rule in religious free exercise cases, in dramatic contrast to the decision below. *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1164 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969) (where a jury's general verdict *may* have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether the jury's verdict was actually reached on other, and permissible, grounds); *George* v. *ISKCON*, *supra*, 262 Cal.Rptr. at 240 (verdict must be reversed "where the record is insufficient to eliminate the possibility that a criminal or civil judgment is

based in whole or in part on conduct protected by the First Amendment"); *Christofferson* v. *Church of Scientology*, *supra*, 644 P.2d at 603-05.

In the present case, rather than reversing because the jury *may* have (indeed almost certainly) found liability on the basis of constitutionally protected activity such as auditing, the court of appeal affirmed because it purportedly found some evidence of unprotected activity that *might* support a verdict for intentional infliction of emotional distress.[19]

The court of appeal also ignored the related constitutional doctrine that a civil judgment must be reversed when the damages awarded have not been explicitly limited to those proximately caused by the unprotected conduct. *See*, *e.g.*, *Gibbs*, 383 U.S. at 730, 735. In the closely analogous *Claiborne Hardware* case, this Court held that "the nonviolent elements" of the defendents' politically motivated economic boycott were protected by the First Amendment, 458 U.S. at 915, and that "[o]nly those [business] losses proximately caused by unlawful conduct may be recovered." 458 U.S. at 918. Noting the hopeless admixture of evidence of business losses resulting from protected and unprotected activity, the Court reversed on the ground that the judgment may have rested, at least in part, on the defendants' exercise of their First Amendment rights:

> It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

458 U.S. at 923.

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19 It is a virtual certainty that the jury did not rest its decision on the court of appeal's secular coercion theory, because that theory was never presented to it. But even if the possibility exists that the jury might have applied this theory on its own, the verdict *must* be overturned, because the jury was not *limited* to, or even informed of, the coercion theory, and because the jury was not instructed that it could *not* base its verdict upon the plaintiff's participation, *per se*, in auditing. The jury therefore may (indeed, was extremely likely to) have rested its decision on the constitutionally impermissible grounds that the religious practices of auditing and disconnect *per se* were outrageous and actionable, as Wollersheim's counsel argued and as presented in the testimony of Wollersheim and his expert witnesses.

The purpose of this rule, too, is to insure that persons are not subject to judgments or damages for engaging in First Amendment protected activities, *even if* they may also have engaged in unprotected activities for which they may be liable. Because the jury in this case, as in *Claiborne Hardware* and *Gibbs*, was not carefully instructed that it could award damages only for injuries proximately caused by violence or threats of violence, or, at the least, from improper coercive activities, and because of the hopeless admixture of protected and purportedly unprotected activity, "[i]t is impossible to conclude that state power has not been extended to compensate [Wollersheim] for the direct consequences of nonviolent, constitutionally protected activity." 458 U.S. at 923. Certiorari should be granted to insure that the necessary rule of *Gibbs* and *Claiborne Hardware* is applied explicitly to religious free exercise cases.

III. The decision of the Court of Appeal is in fundamental conflict with the decisions of this court holding that an appellate court must engage in independent review of the record where a judgment is based upon activity ordinarily protected by the First Amendment.

The court of appeal acknowledged that the provision of auditing ordinarily is protected by the free exercise clause, but "stripped away" (18a), the Church's First Amendment protection in this case because it held that there was evidence upon which the jury could have found that the auditing was provided in a context of physical coercion and secular threats. In so holding, the court simply concluded there was "substantial evidence" to support its invented "coercion" theory (10a). While this may be an appropriate standard of review in an ordinary tort case, when First Amendment interests are at stake, this Court requires that an appellate court engage in an independent examination of the whole record to ensure that the judgment does not constitute a forbidden intrusion into activities protected by the First Amendment. *See Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Had the court undertaken the constitutionally mandated independent review of the evidence, it could not have upheld a finding of liability on this record.

The independent review standard mandates that the appellate court "is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." *Bose*, 466 U.S. at 509-10. The mere fact that "the jury was properly instructed [which it was not in this case] and there is some evidence to support its findings," does not insulate a jury verdict from independent review. *Id.* at 507 (bracketed material added). The independent review requirement ensures that the factfinder has not improperly "cross[ed] the constitutional threshhold that bars the entry of any judgment." *Id.* at 511.

The independent review standard does not require independent review of every factual issue in the case, but only of those contextual factual issues which determine whether activity is within or without the zone of First Amendment protection.[20] Thus, the *Bose* Court noted that independent review is required to determine actual malice in a defamation action (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964)); whether a motion picture is obscene (*Jenkins* v. *Georgia*, 418 U.S. 153, 159-61 (1974)); and whether speech was likely to incite imminent lawless action (*Hess* v. *Indiana*, 414 U.S. 105, 108-09 (1973)), or to cause an actual breach of the peace (*Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963)).[21] *Bose*, 466 U.S. at 506-08.

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20 Thus, on direct appeal of the jury verdict below, the independent review standard was not at issue. Both parties recognized that liability had been imposed for Wollersheim's participation in auditing, *per se*, and there was no need for an independent review of the *evidence*, the Church's position being that the theory of liability was unconstitutional. *Only* when the court of appeal agreed with the Church's basic proposition, but nevertheless affirmed on its contextual secular coercion theory, did the independent review issue arise, *i.e.*, whether an independent review of the evidence would sustain the court's opinion that Wollersheim engaged in auditing out of threats or fear of retribution.

21 The Court also approvingly cited the application of independent evidentiary review in *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940) (free exercise of religion); *Street* v. *New York*, 394 U.S. 576, 592 (1969) (fighting words); *Fiske* v. *Kansas*, 274 U.S. 380, 385-87 (1927) (advocacy of violence).

Application of the standard is well illustrated by *Claiborne Hardware*, *supra*, where the question was whether and to what extent acts of violence and threats had coerced participation in a politically motivated economic boycott, thereby stripping First Amendment protection from all or part of the boycott activities. The Court held that the "fact that such activity is constitutionally protected [but for the alleged violent coercion] . . . imposes a special obligation on this Court to examine critically the basis on which liability was imposed," 458 U.S. at 915, requiring the court to carry out an "independent examination of the entire record" to ensure that the judgment did not violate First Amendment standards. *Id.* at 915 n.50.

Here, the court of appeal acknowledged that non-coerced auditing is protected by the First Amendment, just as a nonviolent boycott was deemed protected in *Claiborne Hardware*. The question here became whether and to what extent purported acts of coercion stripped First Amendment protection from the auditing activities, just as in *Claiborne Hardware* the question was whether and to what extent violence and threats of violence deprived the boycott activities of First Amendment protection. In sharp contrast to this Court's review in *Claiborne Hardware*, however, the court of appeal here did not independently examine the record, "critically" or otherwise, but instead merely determined (without reference to a single record fact) that the jury *may* have found "substantial evidence" to support the coercion theory, which, unlike *Claiborne Hardware*, was not even presented at trial. As is made clear from the statement of the case, independent review of the record would not have permitted the court of appeal to affirm on the basis of its coercion theory.

The failure of appellate courts to apply *Bose*-type review in free exercise cases makes it all too easy for plaintiffs to avoid the strictures of the free exercise clause in religious tort cases.

Bose, 466 U.S. at 505-06 & n.24; *see also Neimotko* v. *Maryland*, 340 U.S. 268, 271 (1951) (freedom of speech and religion) (cited with approval in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S.Ct. 2678, 2695 n.33 (1989)).

Plaintiffs will remain free, as here, to inflame a jury predominantly on the assertion that an unorthodox religious practice is somehow bad or harmful, so long as there is some evidence of coercion upon which an appellate court could speculate that the jury founded its verdict. Meaningful and searching review of the record in such cases is an absolute necessity to insure that the substantive protections of the free exercise clause are applied in a meaningful fashion.

IV. This case presents the important question whether an award of punitive damages against a Church for providing its central religious practice to a parishioner violates the First Amendment.

The court of appeal acknowledged that " 'auditing' qualifies as a 'religious practice'," and recognized auditing's central religious role in Scientology (23a). Nevertheless, the court held that "the state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer *through religious practices* they are coerced into accepting" (30a) (emphasis added). The court below, therefore, clearly allowed recovery not merely for injuries caused by coercion, but for harms purportedly caused by the concededly religious practices themselves.

As the court of appeal also recognized, the state's interest in providing compensation for emotional injuries arising out of religious practices must be compelling or overriding and "the type and level of burden imposed must be the *minimum* required to achieve the state interest" (14a) (emphasis added). *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). However, the court ignored the decisions of this Court that the states lack a compelling interest in allowing the imposition of punitive damages in First Amendment cases or in other cases where strong public interests are at stake. Thus, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court disallowed punitive damages in a libel action brought by a "non-public figure." The Court held that "the states have *no substantial interest* in securing for plaintiffs . . . gratuitous awards of [punitive] money damages far in excess of any actual injury." *Id.* at 349 (emphasis added). The

Court recognized that, consistent with the First Amendment, "state remedies [must] reach no farther than is necessary to protect the legitimate interest involved." *Id.* The Court identified a particular danger in allowing juries to assess punitive damages against the expression of minority views: "[Juries] remain free to use their discretion selectively to punish expressions of unpopular views." *Id.* at 350; *cf. Falwell*, 485 U.S. at 55 (subjective " 'outrageousness' standard" "would allow a jury to impose liability . . . on the basis of the jurors . . . dislike of a particular expression"). In this case, the jury's "preposterous" award of $25,000,000 in punitive damages (43a) clearly "punish[ed] expressions of unpopular [religious] views." *Gertz*, 418 U.S. at 350; *see also International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979) (no punitive damages against labor unions in duty of fair representation cases); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (barring punitive damages against municipalities in actions under 42 U.S.C. § 1983).

Just as in *Gertz*, *Foust*, and *Newport*, the punitive damage award against the Church for harms caused by its central religious activity serves no legitimate, let alone compelling, government interest. Punishment for religious practices by means of ruinous punitive damage awards is a clear and direct infringement of a Church's and its members' right to the free exercise of their religion, and selectively deters religious activity and excessively entangles the government in the intent, motives, and beliefs of church officials in violation of the Establishment Clause. As in *Newport* and *Foust*, where the ultimate victims would be taxpayers and union members, the true victims of punitive awards here are the Church members. Even if the acts complained of were to be deemed tortious, the compensatory damage award makes Wollersheim whole for his actual injuries (41a).[22]

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22 The Church does not claim that a religious organization can never be liable for punitive damages, but only that the state's "compelling interest in allowing its citizens to recover for serious emotional injuries they suffer *through religious practices*," (30a) (emphasis added), whether or not participation is "coerced," must be limited to actual compensatory damages.

V. This case presents the recurring fundamental question whether the standardless award of punitive damages violates constitutional due process.

California law, as applied here, woefully fails to provide standards for determining whether and what punitive damages should be awarded. Indeed, the trial court instructed the jury, in the language of BAJI 14.71, that "[t]he law provides no fixed standard" for their decision (RT 14,796). The factors which the jury is to consider are vaguely defined, if at all, and, indeed, the cases show extraordinary disparity in the size of awards, the relation of award to defendant's net worth, and the ratio between actual and punitive damages, without any apparent relationship to the type of conduct being punished. The absence of more specific guidance leads to the all-too-common phenomenon of runaway jury awards, as happened here. Even assuming a legitimate state interest in permitting punitive damages for peaceful religious practices, the absence of standards in the imposition of the enormous financial penalty here violates the Fourteenth Amendment's guarantee of due process. The action by the court below in reducing the damage award from a "preposterous" $25,000,000 to a massive $2,000,000, not only fails to cure, but rather highlights, the due process violation. While the court concluded that the jury's $25 million punitive damages award was "preposterous" (41a-43a), it could provide no rationale as to the propriety of a $2,000,000 award.[23] Both the jury verdict and the court of appeal's new figure were the

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23 The jury's standardless discretion was exacerbated here by the trial court's refusal to give, despite the Church's explicit request, what appeared to be a statutorily mandated jury instruction (BAJI 14.73) that punitive damages may be assessed against a corporation only when an officer, director, or managing agent directs or ratifies the underlying acts of the agents or employees of the corporation, Cal.Civ.Code § 3294(b) (as amended 1980), not on the *respondeat superior* theory given by the trial court (RT 14,783-84). The failure of *any* state court even to address this repeatedly argued issue in this case demonstrates not only the lack of standards for the jury in *the amount* of punitive damages, but also the complete discretion of the courts in choosing *the method* by which punitive damages are imposed—pursuant to acts directly of the corporation under BAJI 14.73, or pursuant to a *respondeat superior* theory.

product of a system that provides juries and appellate courts with standardless discretion to award whatever amount they wish.

Three years ago, this Court, in an opinion by Chief Justice Burger, acknowledged that the question whether the "lack of sufficient standards governing punitive damage awards" violates due process is an "important issue[ ] which, in an appropriate setting, must be resolved." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986). Last Term, in *Browning-Ferris Industries, Inc.* v. *Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), four Justices explicitly stated that the Due Process Clause constrained not only the size of punitive damage awards, but also "the method by which they are imposed." 109 S.Ct. at 2924 (O'Connor, J. concurring in part and dissenting in part, joined by Stevens, J.); *id.* at 2923 (Brennan, J. concurring, joined by Marshall, J.) ("instruction reveals a due process flaw: . . . punitive damages are imposed by juries guided by little more than an admonition to do what they think is best"). The majority opinion also stated that the argument that the Due Process Clause "acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit" remains an open question. *Id.* at 2921.[24]

In light of *Aetna* and *Browning-Ferris*, the "preposterous" jury verdict, the absence of any explanation for the court of appeal's $2,000,000 award, and the apparent discretion of California courts to give or to refuse a statutory instruction on corporate liability for punitive damages, this Court should grant review to determine whether the punitive damage award and "the method by which [it was] imposed," 109 S.Ct. at 2924, violated the Church's due process rights.

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24 The Court was unanimous in *Browning-Ferris* that the due process question was not properly before it. The Court held only that the Eighth Amendment excessive fines clause did not apply to an award of punitive damages under state law. 109 S.Ct. at 2914.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Dated: February 23, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

SO11790

LARRY WOLLERSHEIM,

Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Appellant.

ORDER DENYING REVIEW

Order Filed October 26, 1989

AFTER JUDGMENT BY THE COURT OF APPEALS
Second Appellate District, Division Seven,
No. B023193

Appellant's and respondent's petitions for review DENIED.

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B023193

Filed: August 17, 1989

(LASC No. C332827)

LARRY WOLLERSHEIM,
Plaintiff and Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Defendant and Appellant.

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion filed herein on July 18, 1989, be modified in the following particulars:

On page 2, line 4 of the first paragraph change the word "appellants" to "appellant." Thereafter, change the plural form "appellants" and "appellants' " to the singular form "appellant" and "appellant's" throughout the remainder of the opinion.

On page 2, line 9 of the first paragraph, change "they were" to "it was."

On page 7, line 1 of the second paragraph change "raise" to "raises".

On page 34, line 4 of the second paragraph change "church" to "Church."

On page 47, line 6 from the bottom of the page change "they were" to "it was." On line 2 from the bottom of the same page change "were able" to "was able".

On page 48, line 1 change "complain" to "complains" and in line 2, change "they" to "it".

On page 48, line 3 of the second paragraph change "they" to "appellant".

On page 49, line 10 change "complain" to "complains" and in line 11 change "their" to "its".

On page 50, line 10 change "complain" to "complains"; in line 11 change "they mention" to "it mentions"; in line 12 change "they accuse" to "it accuses"; in line 14 change "their brief appellants concede" to "its brief appellant concedes" and in line 16 change "they ask" to "it asks."

On page 51, line 7 change "object" to "objects."

In the second paragraph on the same page, line 1 change the word "complain" to "complains"; in line 3 change "their" to "its"; in line 4 change "provide" to "provides"; in line 6 change "They confine themselves" to "It confines itself"; in line 8 change "they expect" to "it expects" and in line 9 change "their" to "its."

On page 52, the first paragraph, line 1 change "their" to "its"; in line 2 change "set" to "sets", "their" to "its" and "they" to "it"; in line 3 change "allege" to "alleges" and line 11, change "their" to "its".

On page 56, line 7 replace the sentence commencing "This appears . . . ." with the following sentence:

> This ratio is well outside the permissible range established in other appellate cases.

On the same page, the last two lines on the page, replace the sentence commencing "We find it . . . ." with the following two sentences:

> Respondent asserts appellant's true net worth approaches $250 million not $16 million and thus the punitive damage award is not excessive. However,

respondent failed to prove the higher net worth figure at trial.

Appellant's petition for rehearing is denied. Respondent's petition for rehearing is denied.

No change in judgment.

CERTIFIED FOR PUBLICATION

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

B023193

Filed: July 18, 1989

(LASC No. C332827)

LARRY WOLLERSHEIM,
Plaintiff and Respondent,

—v.—

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald Swearinger, Judge. Modified, affirmed in part and reversed in part.

Rabinowitz, Boudin, Standard, Krinsky & Lieberman and Eric M. Lieberman and Terry Gross, Lenske, Lenske & Heller and Lawrence E. Heller, and Michael Lee Hertzberg for Defendant and Appellant.

Greene, O'Reilly, Broillet, Paul, Simon, McMillan, Wheeler & Rosenberg and Charles B. O'Reilly for Plaintiff and Respondent.

Boothby, Ziprick & Yingst and William F. Ziprick, Lee Boothby and James M. Parker as Amicus Curiae on behalf of Defendant and Appellant.

This appeal arises after a jury awarded $30 million in compensatory and punitive damages to a former member of the Church of Scientology (the Church). The complaint alleged appellants intentionally and negligently inflicted severe emotional injury on respondent through certain practices, including "auditing," "disconnect," and "fair game." Since the trial court granted summary adjudication that Scientology is a religion and "auditing" is a religious practice, the trial proceeded under the assumption they were. We conclude there was substantial evidence to support a factual finding the "auditing," as well as other practices in this case, were conducted in a coercive environment. Thus, none of them qualified as "*voluntary* religious practices" entitled to constitutional protection under the First Amendment religious freedom guarantees. At the same time, we conclude both the compensatory and punitive damages the jury awarded in this case are excessive. Consequently, we modify the judgment to reduce both of these damage awards.

FACTS AND PROCEEDINGS BELOW

Construing the facts most favorably to the judgment, as we must, respondent Larry Wollersheim was an incipient manic-depressive for most of his life. Appellants Scientology and its leaders were aware of Wollersheim's susceptibility to this mental disorder: What appellants did to him during and after his years in Scientology aggravated Wollersheim's mental condition, driving him into deep depressive episodes and causing him severe mental anguish. Furthermore, Scientology engaged in a practice of retribution and threatened retribution—often called "fair game"—against members who left or otherwise posed a threat to the organization. This practice coerced Wollersheim into continued participation in the other practices of Scientology which were harming him emotionally.

Wollersheim first became acquainted with Scientology in early 1969 when he attended a lecture at the "Church of Scientology of San Francisco." During the next few months

he completed some basic courses at the San Francisco institution. He then returned to his home state of Wisconsin and did not resume his scientology training for almost two years.

When Wollersheim did start again it was at the appellant, Church of Scientology of California, headquartered in Los Angeles. From 1972 through 1979 Wollersheim underwent "auditing" at both the basic and advanced levels. In 1973 he worked several months as a staff member at the Church of Scientology Celebrity Center located in Los Angeles. In 1974, despite his repeated objections, Wollersheim was persuaded to participate in auditing aboard a ship maintained by Scientology. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. Further, Wollersheim and others were forced to sleep nine deep in the ship's hold. During his six weeks under these conditions, Wollersheim lost 15 pounds.

Wollersheim attempted to escape from the ship because he felt he "was dying and losing [his] mind." His escape was thwarted by Scientology members who seized Wollersheim and held him captive until he agreed to remain and continue with the auditing and other religious practices taking place on the vessel. One of the psychiatric witnesses testified Wollersheim's experience on the ship was one of five cataclysmic events underlying the diagnosis of his mental illness and its cause.

At another stage Scientology auditors convinced him to "disconnect" from his wife and his parents and other family members because they had expressed concerns about Scientology and Wollersheim's continued membership. "Disconnect" meant he was no longer to have any contact with his family.

There also was evidence of a practice called "freeloader debt." "Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally

charged to the member. Appellants maintained a "freeloader debt" account for Wollersheim.

During his years with Scientology Wollersheim also started and operated several businesses. The most successful was the last, a service which took and printed photographic portraits. Most of the employees and many of the customers of this business were Scientologists.

By 1979, Wollersheim's mental condition worsened to the point he actively contemplated suicide. Wollersheim began experiencing personality changes and pain. When the Church learned of Wollersheim's condition, Wollersheim was sent to the Flag Land Base for "repair."

During auditing at Flag Land Base, Wollersheim's mental state deteriorated further. He fled the base and wandered the streets. A guardian later arranged to meet Wollersheim. At that meeting, the guardian told Wollersheim he was prohibited from ever speaking of his problems with a priest, a doctor or a psychiatrist.

Ultimately Wollersheim became so convinced auditing was causing him psychiatric problems he was willing to risk becoming a target of "freeloader debt" and "fair game." Evidence was introduced that, at least during the time relevant to Wollersheim's case, "fair game" was a practice of retribution Scientology threatened to inflict on "suppressives," which included people who left the organization or anyone who could pose a threat to the organization. Once someone was identified as a "suppressive," all scientologists were authorized to do anything to "neutralize" that individual—economically, politically, and psychologically.

After Wollersheim left the organization Scientology leaders initiated a "fair game" campaign which among other things was calculated to destroy Wollersheim's photography enterprise. They instructed some Scientology members to leave Wollersheim's employ, told others not to place any new orders with him and to renege on bills they owed on previous purchases from the business. This strategy shortly drove Wollersheim's photography business into bankruptcy. His mental condition deteriorated further and he ended up under psychiatric care.

Wollersheim thereafter filed this lawsuit alleging fraud, intentional infliction of emotional injury, and negligent infliction of emotional injury. At the law-and-motion stage, a trial court granted summary adjudication on two vital questions. It ruled Scientology is a religion and "auditing" is a religious practice of that religion.

During trial, Wollersheim's experts testified Scientology's "auditing" and "disconnect" practices constituted "brain-washing" and "thought reform" akin to what the Chinese and North Koreans practiced on American prisoners of war. They also testified this "brain-washing" aggravated Wollersheim's bipolar manic depressive personality and caused his mental illness. Other testimony established Scientology is a hierarchical organization which exhibits near paranoid attitudes toward certain institutions and individuals—in particular, the government, mental health professions, disaffected members and others who criticize the organization or its leadership. Evidence also was introduced detailing Scientology's retribution policy, sometimes called "fair game."

After the evidence was heard, the trial judge dismissed the fraud count but allowed both the intentional and negligent infliction of emotional injury counts to go to the jury. The jury, in turn, returned a general verdict in favor of plaintiff on both counts. It awarded $5 million in compensatory damages and $25 million in punitive damages. The motion for new trial was denied and appellants filed a timely appeal.

DISCUSSION

Appellants raise a broad spectrum of issues all the way from a technical statute of limitations defense to a fundamental constitutional challenge to this entire species of claims against Scientology. If the narrower grounds of appeal had merit and disposed of the case we could avoid confronting the difficult constitutional questions. But since they do not we must consider Scientology's religious freedom claims.

I. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT WOLLERSHEIM'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

The cause of action for intentional infliction of emotional injury formed the centerpiece of the case which went to the jury. This claim actually cumulates four courses of conduct which together allegedly inflicted severe emotional damage on the psychologically weak Wollersheim. These courses of conduct are: (1) subjecting Wollersheim to forms of "auditing" which aggravated his predisposition to bipolar mania-depression; (2) psychologically coercing him to "disconnect" from his family; (3) "disclosing personal information" Wollersheim revealed during auditing under a mantle of confidentiality; and, (4) conducting a retributive campaign ("fair game") against Wollersheim and particularly against his business enterprise.

The tort of intentional infliction of emotional distress was created to punish conduct " 'exceeding all bounds usually tolerated by a decent society, of a nature which is especially calculated to cause, and does cause, mental distress.' " (*Agarwal* v. *Johnson* (1979) 25 Cal.3d 932, 946.) A prima facie case requires: (1) outrageous conduct by the defendant; (2) an intention by the defendant to cause, or the reckless disregard of the probability of causing, emotional distress; (3) severe emotional distress; and (4) an actual and proximate causation of the emotional distress. (*Nally* v. *Grace Community Church* (1988) 47 Cal.3d 278, 300.)

"Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress." (*Agarwal* v. *Johnson*, *supra*, 25 Cal.3d at p. 946.)

There is substantial evidence to support the jury's finding on this theory. First, the Church's conduct was manifestly outrageous. Using its position as his religious leader, the Church and its agents coerced Wollersheim into continuing

"auditing" although his sanity was repeatedly threatened by this practice. (See pp. 29-33, *infra.*) Wollersheim was compelled to abandon his wife and his family through the policy of disconnect. When his mental illness reached such a level he actively planned his suicide, he was forbidden to seek professional help. Finally, when Wollersheim was able to leave the Church, it subjected him to financial ruin through its policy of "fair game".

Any one of these acts exceeds the "bounds usually tolerated by a decent society," so as to constitute outrageous conduct. In aggregate, there can be no question this conduct warrants liability *unless it is privileged as constitutionally protected religious activity.* (See pp. 11-17, *infra.*)

Second, the Church's actions, if not wholly calculated to cause emotional distress, unquestionably constituted reckless disregard for the likelihood of causing emotional distress. The policy of fair game, by its nature, was intended to punish the person who dared to leave the Church. Here, the Church actively encouraged its members to destroy Wollersheim's business.

Further, by physically restraining Wollersheim from leaving the Church's ship, and subjecting him to further auditing despite his protests, the Church ignored Wollersheim's emotional state and callously compelled him to continue in a practice known to cause him emotional distress.

Third, Wollersheim suffered severe emotional distress. Indeed, his distress was such that he actively considered suicide and suffered such psychiatric injury as to require prolonged professional therapy. (See *Fletcher* v. *Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 397 [severe emotional distress "may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry"].)

Finally, there is substantial evidence the Church's conduct proximately caused the severe emotional distress. Wollersheim's bankruptcy and resulting mental distress was the direct result of the Church's declaration that he was fair game. Additionally, according to the psychiatric testimony

auditing and disconnect substantially aggravated his mental illness and triggered several severe depressive episodes.

In sum, there is ample evidence to support the jury's verdict on Wollersheim's claim for intentional infliction of emotional distress. This, however, does not conclude our inquiry. As we discuss below, Wollersheim's action may nonetheless be barred if we conclude the Church's conduct was protected under the free exercise clause of the First Amendment.

II. CONSTITUTIONAL RELIGIOUS FREEDOM GUARANTEES DO NOT IMMUNIZE SCIENTOLOGY FROM LIABILITY FOR ANY OF THE ACTIONS ON WHICH WOLLERSHEIM'S INTENTIONAL INFLICTION OF EMOTIONAL INJURY CAUSE OF ACTION IS BASED

Scientology asserts all four courses of conduct comprising the intentional infliction claim are forms of religious expression protected by the Freedom of Religion clauses of the United States and California Constitutions. We conclude some would not be protected religious activity even if Wollersheim freely participated. We further conclude none of these courses of conduct qualified as protected religious activity in Wollersheim's case. Here they occurred in a coercive atmosphere appellants created through threats of retribution against those who would leave the organization. To explain our conclusions it is necessary to examine the parameters and rationale of the religious freedom provisions in some depth.

A. *The Basic Principles of the "Free Exercise" Clause*

Religious freedom is guaranteed American citizens in just 16 words in the First Amendment. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof; . . ." (U.S. Const., Amend. I, italics added.[1].)

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1 All discussion in this opinion as to the freedom of religion provisions of the U.S. Constitution applies also to appellants' claims under article I, section 4 of the California Constitution which guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference."

When it was adopted, the First Amendment only applied to the federal government, not the states. (U.S. Const., 1st Amend. ["*Congress* shall make no law . . ."], emphasis added; see *Permoli v. First Municipality* (1845) 44 U.S. 589, 609.) However, following ratification of the Fourteenth Amendment, the First Amendment protections became enforceable against the states via the Fourteenth Amendment's due process clause. (*California v. Grace Brethren Church* (1982) 457 U.S. 393, 396 fn. 1; *Everson v. Board of Education* (1947) 330 U.S. 1, 8.)

"[T]he application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power. When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred." (*Paul v. Watchtower Bible & Tract Soc. of New York* (9th Cir. 1987) 819 F.2d 875, 880; accord *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1114 ["judicial sanctioning of tort recovery constitutes state action sufficient to invoke the same constitutional protections applicable to statutes and other legislative actions"]; see *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 277.)

As can be seen, the First Amendment creates two very different protections. The "establishment clause"—actually an "*anti*-establishment clause"—guarantees us the government will not use its resources to impose religion on us. The "free exercise clause," on the other hand, guarantees us government will not prevent its citizens from pursuing any religion we choose.

The "establishment clause" comes into play when a government policy has the effect of promoting religion—as by financing religious schools or requiring religious prayers in public schools, and the like. These policies violate the establishment clause unless they survive a three-part test. They must have a secular purpose. Their primary effects must be ones which neither advance nor inhibit religion. And they must avoid any excessive entanglements with religion. (*Lemon* v. *Kurtzman* (1971) 403 U.S. 602, 612-613; see also *Committee for Public Education v. Nyquist* (1973) 413 U.S.

756, 773; *Abington School Dist. v. Schempp* (1963) 374 U.S. 203, 222.) The "free exercise clause," in contrast to the "establishment clause," was adopted without debate or comment when the First Congress deliberated the Bill of Rights. (Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1976).) Thus the courts have turned to other writings by those responsible for the Bill of Rights, especially James Madison and Thomas Jefferson, to divine the meaning of "free exercise of religion."

The subsequent cases interpreting these four words make it clear that while the free exercise clause provides absolute protection for a person's religious *beliefs*, it provides only limited protection for the *expression* of those beliefs and especially *actions* based on those beliefs. (*Cantwell* v. *Connecticut* (1940) 310 U.S. 296, 303-304.) Freedom of belief is absolutely guaranteed, freedom of action is not. Thus government cannot constitutionally burden any belief no matter how outlandish or dangerous. But in certain circumstances it can burden an expression of belief which adversely affects significant societal interests. To do so, the burden on belief must satisfy a four-part test: First, the government must be seeking to further an important—and some opinions suggest a compelling—state interest. Secondly, the burden on expression must be essential to further this state interest. Thirdly, the type and level of burden imposed must be the minimum required to achieve the state interest. Finally, the measure imposing the burden must apply to everyone, not merely to those who have a religious belief; that is, it may not discriminate against religion.

A straightforward exposition of three prongs of this test is found in *United States* v. *Lee* (1981) 455 U.S. 252, 257-258 where the Supreme Court held: "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. (Citations omitted.)" All four are mentioned in *Braunfeld* v. *Brown* (1961) 366 U.S. 599, 607: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid . . . . But if the State regulates conduct by

enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." (See also *Thomas* v. *Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 717-718; *Wisconsin* v. *Yoder* (1972) 406 U.S. 205, 220; *Gillette* v. *United States* (1971) 401 U.S. 437, 462; *Sherbert* v. *Verner* (1963) 374 U.S. 398, 402-403; *Cantwell* v. *Connecticut*, *supra*, 310 U.S. at pp. 304-305.)

A review of the Supreme Court's "free exercise" rulings also makes it apparent the four critical factors are interrelated. Roughly speaking, the heavier the burden the government imposes on the expression of belief and the more significant the particular form of expression which is burdened, the more important the state interest must be. Or to put it the other way around, the more important the interest the state seeks to further, the heavier the burden it can constitutionally impose on the more important forms of expressing religious belief. Thus, only the most compelling of state interest—such as the preservation of life or of the state itself—will justify an outright ban on an important method of expressing a religious belief. (See, e.g., *Reynolds* v. *United States* (1878) 98 U.S. 145, 164 [polygamy can be outlawed even though a central religious tenet of the Mormon religion because it "has always been odious among the northern and western nations of Europe, . . . and from the earliest history of England has been treated as an *offence against society.*" [Italics added.]; *Prince* v. *Massachusetts* (1943) 321 U.S. 158, 170 [parents can be prohibited from allowing their children to distribute religious literature even though this is a religious duty required in order to avoid "everlasting destruction at Armageddon" where necessary to protect the health and safety of youth]; *Jacobson* v. *Massachusetts* (1904) 197 U.S. 11, 26 [adults and children can be compelled to be vaccinated for communicable diseases even though their religious beliefs oppose vaccination because as was observed in *Prince* v. *Massachusetts*, *supra*, 321 U.S. at pp. 166-167, "'[T]he right to practice religion freely does not include liberty to expose

the community or the child to communicable disease or the latter to ill health or death"].)

But a less significant state interest may be enough where the burden is less direct or the form of expression less central to the exercise of the particular religion. (See, e.g., *Goldman* v. *Weinberger* (1986) 475 U.S. 503, 509-510 where the military's apparently rather marginal interest in absolutely uniform attire was enough to justify an outright ban against a Jewish officer's apparently rather marginal form of religious expression in wearing a yarmulke [a religious cap] indoors.) In *Bowen* v. *Roy* (1986) 476 U.S. 693, disapproved on other grounds in *Hobbie* v. *Unemployment Appeals Commission* (1987) 480 U.S. 136, 141, the U.S. Supreme Court found the Federal government's interest in administrative convenience in preventing fraud in a benefit program was enough to justify the minimal burden of denying benefits to those who because of religious beliefs refuse to obtain and reveal social security numbers. *Braunfeld* v. *Brown*, *supra*, 366 U.S. 599, 605 [governmental interest in prohibiting economic activity on Sundays is enough to justify imposing the burden of an economic loss on those orthodox Jews who choose to exercise their religious belief that they not work on Saturdays and thus lose two rather than only one day's opportunity to earn money. "[T]he case before us . . . does not make *unlawful* any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs *more expensive*"], italics added.)

We now apply the above principles to the four courses of conduct alleged in Wollersheim's intentional infliction of emotional injury cause of action. To be entitled to constitutional protections under the Freedom of Religion clauses any course of conduct must satisfy three requirements. First, the system of thought to which the course of conduct relates must qualify as a "religion" not a philosophy or science or personal preference. Thus, it is unlikely a psychiatrist could successfully shield himself from malpractice by asserting he was merely practicing the "religion" of psychotherapy and following the "religious" teachings of Freud and Jung. Sec-

ondly, the course of conduct must qualify as an expression of that religion and not just an activity that religious people happen to be doing. Thus, driving a Sunday School bus does not constitute a religious practice merely because the bus is owned by a religion, the driver is an ordained minister of the religion, and the bus is taking church members to a religious ceremony. (See *Malley* v. *Fong* (1951) 37 Cal.2d 356, 373 [religious organization held liable for employee's negligent driving]; *Meyers* v. *S.W. Reg. Con. Ass'n. of Seventh Day Adv.* (La. 1956) 88 So.2d 381, 386 [First Amendment does not bar minister's workers' compensation action against church for injuries arising from auto accident which occurred when minister was traveling to church conference].) And, thirdly, the religious expression must not inflict so much harm that there is a compelling state interest in discouraging the practice which outweighs the values served by freedom of religion. Thus, the fact polygamy was a central practice of the Mormon religion was not enough to qualify it for constitutional protection from state governments which desired to ban this practice.

This means we must first ask three questions as to each of the four courses of conduct Wollersheim alleged against Scientology. (1) Does Scientology qualify as a religion? (2) If so, is the course of conduct at issue an expression of the religion of Scientology? (3) If it is, does the public nevertheless have a compelling secular interest in discouraging this course of conduct even though it qualifies as a religious expression of the Scientology religion? After answering these three questions, however, the special circumstances of this case require us to ask a fourth. Did Wollersheim participate in this course of conduct voluntarily or did Scientology coerce his continued participation through the threat of serious sanctions if he left the religion?

The threshold question for all four courses of conduct is whether Scientology qualifies as a religion. As will be recalled, at the law-and-motion stage, a judge granted summary adjudication on this issue. That court ruled Scientology indeed was a religion. And at the trial stage, another judge

reinforced this ruling by submitting the case to the jury with an instruction that Scientology is a religion.

As a result of the law-and-motion judge's decision on this question, evidence was not introduced at trial on the specific issue of whether Scientology is a religion. Given that vacuum of information, it would be presumptuous of this court to attempt a definitive decision on this vital question. We note other appellate courts have observed this remains a very live and interesting question. (See *Founding Church of Scientology* v. *United States* (D.C.Cir. 1969) 409 F.2d 1146, 1160-1161; *Founding Church of Scientology* v. *Webster* (D.C.Cir. 1986) 802 F.2d 1448, 1451 ["whether Scientology is a religious organization, a for-profit private enterprise, or something far more extraordinary [is] an intriguing question that this suit does not call upon us to examine . . . ."].) However, we have no occasion to go beyond a review of the summary adjudication decision the trial court reached at the law-and-motion stage. In reviewing this decision, we find that on the evidence before the court the judge properly ruled Scientology qualifies as a religion within the meaning of the Freedom of Religion Clauses of the United States and California Constitutions.

This brings us to the remaining three questions as to each of the four courses of conduct: Is the conduct a "religious practice"? If so, is there a compelling secular interest in requiring compensation for the injuries attributable to that practice? If the constitutional immunity is not overridden by a compelling state interest in the ordinary situation, is it nevertheless stripped away here because the religion coerced the injured member into continuing his participation in the practice?

B. *Even Assuming the Retributive Conduct Sometimes Called "Fair Game" Is a Core Practice of Scientology It Does Not Qualify for Constitutional Protection*

As we have seen, not every religious expression is worthy of constitutional protection. To illustrate, centuries ago the

inquisition was one of the core religious practices of the Christian religion in Europe. This religious practice involved torture and execution of heretics and miscreants. (See generally Peters, Inquisition (1988); Lea, The Inquisition of the Middle Ages (1961).) Yet should any church seek to resurrect the inquisition in this country under a claim of free religious expression, can anyone doubt the constitutional authority of an American government to halt the torture and executions? And can anyone seriously question the right of the victims of our hypothetical modern day inquisition to sue their tormentors for any injuries—physical or psychological—they sustained?

We do not mean to suggest Scientology's retributive program as described in the evidence of this case represented a full-scale modern day "inquisition." Nevertheless, there are some parallels in purpose and effect. "Fair game" like the "inquisition" targeted "heretics" who threatened the dogma and institutional integrity of the mother church. Once "proven" to be a "heretic," an individual was to be neutralized. In medieval times neutralization often meant incarceration, torture, and death. (Peters, Inquisition, *supra*, pp. 57, 65-67, 87, 92-94, 98, 117-118, 133-134; Lea, The Inquisition of the Middle Ages, *supra*, pp. 181, 193-202, 232-236, 250-264, 828-829.) As described in the evidence at this trial the "fair game" policy neutralized the "heretic" by stripping this person of his or her economic, political and psychological power. (See, e.g., *Allard* v. *Church of Scientology* (1976) 58 Cal.App.3d 439, 444 [former church member falsely accused by Church of grand theft as part of "fair game" policy, subjecting member to arrest and imprisonment].)

In the instant case, at least, the prime focus of the "fair game" campaign was against the "heretic" Wollersheim's economic interests. Substantial evidence supports the inference Scientology set out to ruin Wollersheim's photography enterprise. Scientologists who worked in the business were instructed to resign immediately. Scientologists who were customers were told to stop placing orders with the business. Most significantly, those who owed money for previous orders were instructed to renege on their payments. Although

these payments actually were going to a factor not Wollersheim, the effect was to deprive Wollersheim of the line of credit he needed to continue in business.

Appellants argue these "fair game" practices are protected religious expression. They cite to a recent Ninth Circuit case upholding the constitutional right of the Jehovah's Witness Church and its members to "shun" heretics from that religion even though the heretics suffer emotional injury as a result. (*Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875.) In this case a former Jehovah's Witness sued the church and certain church leaders for injuries she claimed to have suffered when the church ordered all other church members to "shun" her. In the Jehovah Witness religion, "shunning" means church members are prohibited from having any contact whatsoever with the former member. They are not to greet them or conduct any business with them or socialize with them in any manner. Thus, there was a clear connection between the religious practice of "shunning" and Ms. Paul's emotional injuries. Nonetheless, the trial court dismissed her case. The Ninth Circuit affirmed in an opinion which expressly held "shunning" is a constitutionally protected religious practice. "[T]he defendants, . . . possess an affirmative defense of privilege—a defense that permits them to engage in the practice of shunning pursuant to their religious beliefs without incurring tort liability." (*Id.* at p. 879.)

We first note another appellate court has taken the opposite view on the constitutionality of "shunning." (*Bear* v. *Reformed Mennonite Church* (Pa. 1975) 341 A.2d 105.) In this case the Pennsylvania Supreme Court confronted a situation similar to *Paul* v. *Watchtower Bible & Tract Soc. of New York*. The plaintiff was a former member of the Mennonite Church. He was excommunicated for criticizing the church. Church leaders ordered that all members must "shun" the plaintiff. As a result, both his business and family collapsed. The appellate court reversed the trial court's dismissal of the action, holding: "In our opinion, the complaint, . . . raises issues that the 'shunning' practice of appellee church and the conduct of the individuals may be an

excessive interference within areas of 'paramount state concern,' i.e., the maintenance of marriage and family relationship, alienation of affection, and the tortious interference with a business relationship, which the courts of this Commonwealth *may* have authority to regulate, even in light of the 'Establishment' and 'Free Exercise' clauses of the First Amendment." (*Bear* v. *Reformed Mennonite Church*, *supra*, 341 A.2d at p. 107, emphasis in original.)

We observe the California Supreme Court has cited with apparent approval the viewpoint on "shunning" expressed in *Bear* v. *Mennonite Church*, *supra*, rather than the one adopted in *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*. (See *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1114.) But even were *Paul* v. *Watchtower Bible & Tract Soc. of New York* the law of this jurisdiction it would not support a constitutional shield for Scientology's retribution program. In the instant case Scientology went far beyond the social "shunning" of its heretic, Wollersheim. Substantial evidence supports the conclusion Scientology leaders made the deliberate decision to ruin Wollersheim economically and possibly psychologically. Unlike the plaintiff in *Paul* v. *Watchtower Bible & Tract Soc. of New York*, Wollersheim did not suffer his economic harm as an unintended byproduct of his former religionists' practice of refusing to socialize with him any more. Instead he was bankrupted by a campaign his former religionists carefully designed with the specific intent it bankrupt him. Nor was this campaign limited to means which are arguably legal such as refusing to continue working at Wollersheim's business or to purchase his services or products. Instead the campaign featured a concerted practice of refusing to honor legal obligations Scientologists owed Wollersheim for services and products they already had purchased.

If the Biblical commandment to render unto Caesar what is Caesar's and to render unto God what is God's has any meaning in the modern day it is here. Nothing in *Paul* v. *Watchtower Bible & Tract Soc. of New York* or any other case we have been able to locate even implies a religion is entitled to constitutional protection for a campaign deliber-

ately designed to financially ruin anyone—whether a member or non-member of that religion. Nor have we found any cases suggesting the free exercise clause can justify a refusal to honor financial obligations the state considers binding and legally enforceable. One can only imagine the utter chaos that could overtake our economy if people who owed money to others were entitled to assert a freedom of religion defense to repayment of those debts. It is not unlikely the courts would soon be flooded with debtors who claimed their religion prohibited them from paying money they owed to others.

We are not certain a deliberate campaign to financially ruin a former member or the dishonoring of debts owed that member qualify as "religious practices" of Scientology. But if they do, we have no problem concluding the state has a compelling secular interest in discouraging these practices. (See pp. 14-17, *supra*.) Accordingly, we hold the Freedom of Religion guarantees of the U.S. and California Constitutions do not immunize these practices from civil liability for any injuries they cause to "targets" such as Wollersheim.

C. *"Auditing" Is a Constitutionally Protected Religious Practice Where It Is Conducted in a Non-coercive Environment But Is Not Protected Where Conducted Under a Threat of Economic, Psychological and Political Retribution as It Was Here*

Auditing is a process of one-on-one dialogue between a Scientology "auditor" and a Scientology student. The student ordinarily is connected to a crude lie detector, a so-called "E-Meter." The auditor asks probing questions and notes the student's reactions as registered on the E-Meter.

Through the questions, answers, and E-meter readings, the auditor seeks to identify the student's "n-grams" or "engrams." These "engrams" are negative feelings, attitudes, or incidents that act as blockages preventing people from realizing their full potential and living life to the fullest. Since Scientology holds the view people actually have lived many past lives over millions of years they carry "engrams" accumulated during those past lives as well as some from

their present ones. Once the auditor identifies an "engram" the auditor and the student work to surface and eliminate it. The goal is to identify and eliminate all the student's engrams so he or she can achieve the state of "clear." Students can pass through several levels of "auditing" en route to ever higher states of "clear."

Auditing performs a similar function for Scientology as sermons and other forms of mass persuasion do for many religions. In those religions, ministers, priests or other clergy preach to the multitude in order to bring their adherents into line with the religion's principles. Scientology instead emphasizes a one-on-one approach—the "auditing" process—to accomplish the same purpose.

At the law-and-motion stage, the trial court granted summary adjudication that "auditing" is a "religious practice" of Scientology. Once again, our review of the trial court decision reveals that on the basis of the evidence before the court on that occasion, the ruling is correct. Thus for purposes of this appeal we find "auditing" qualifies as a "religious practice" just as Scientology qualifies as a "religion."

Having found for purposes of this appeal that Scientology is a religion and auditing is a religious practice, we must next ask whether the state has a "compelling interest" in awarding compensation for any harm auditing may cause which outweighs the values served by the religious expression guarantees of the constitution.

We first note we have already held there was substantial evidence to support a jury finding that what happened during the "auditing" process, along with Scientology's other conduct toward Wollersheim, caused this particular adherent serious emotional injury. We further found substantial evidence Scientology leaders were aware of Wollersheim's psychological weakness and yet continued practices during auditing sessions which caused the kinds of psychological stress that led to his mental breakdown. Thus, there is adequate proof the religious practice of auditing caused real harm in this instance to this individual and that appellants' outrageous conduct caused that harm. Furthermore, there is sufficient evidence to support a conclusion that despite their

knowledge auditing was aggravating Wollersheim's serious psychological problems appellants deliberately insisted he not seek help from professional psychotherapists. None of this, however, means auditing represents such a threat of harm to society that the state has a compelling interest in awarding compensation which overcomes the values served by the religious expression guarantees of the constitution.

To better understand why we conclude *voluntary* auditing may be entitled to immunity from liability for the emotional injuries it causes, consider some analogies. Assume Wollersheim were not a former Scientologist, but a former follower of one of the scores of Christian denominations. Further assume he sued on grounds a preacher's sermons filled him with such feelings of inferiority and guilt his manic-depressive condition was aggravated to the same degree Wollersheim contends auditing aggravated his mental illness in this case. Or assume another Wollersheim sued another church for a similar emotional injury on grounds his mental illness had been triggered by what a cleric told him about his sins during a confession—or series of confessions. It is one of the functions of many religions to "afflict the comfortable"—to deliberately generate deep psychological discomfort as a means of motivating "sinners" to stop "sinning." Whether by "hell fire and damnation" preaching, "speaking in tongues," private chastising, or a host of subtle and not so subtle techniques religion seeks to make us better people.

Many of these techniques are capable of inflicting emotional distress severe enough that it is foreseeable some with psychiatric problems will "crack" or be driven into a deep depression. But the constitution values the good religion does for the many more than the psychological injury it may inflict on the few. Thus, it cannot tolerate lawsuits which might chill religious practices—such as auditing, "hell fire and damnation" preaching, confessions, and the like—where the only harm which occurs is emotional injury to the psychologically weak.

There is an element present in the instant case, however, that reduces the religious value of the "auditing" practiced

on Wollersheim and increases its harm to the community. This is the element of coercion. Scientology, unlike most other religions or organizations claiming a religious purpose, uses various sanctions and the threat of sanctions to induce continued membership in the Church and observance of its practices. These sanctions include "fair game", "freeloader debt" and even physical restraint. There was nothing in the evidence presented at this trial suggesting new recruits and members undergoing lower-level "auditing" were subject to sanctions if they decided to leave. Nor was there evidence these recruits or "lower level" auditors would be aware any program of sanctions even existed and thus might be intimidated by it. But there was evidence others, like Wollersheim, who rose to higher levels of auditing and especially those, like Wollersheim, who became staff members—the rough equivalent of becoming a neophyte priest or minister—were aware of these sanctions and what awaited them if they chose to "defect." Thus, their continued participation in "auditing" and the other practices of Scientology was not necessarily voluntary.

Wollersheim was familiar with the whole spectrum of sanctions and indeed was the target of some during and after his affiliation with Scientology. He first learned of one of these forms of retribution, "fair game," in 1970. He also knew that, despite the Church's public rejection of the fair game practice, it continued to use fair game against targeted ex-Scientologists throughout the 1970's. Under Scientology's "fair game" policy, someone who threatened Scientology by leaving the church "may be deprived of property or injured by any means by a Scientologist . . . . [The targeted defector] may be tricked, sued or lied to or destroyed."

Wollersheim feared "fair game" would be practiced against him if he refused further auditing and left the Church of Scientology. As described in the previous section, those fears proved to be accurate. Scientology leaders indeed became very upset by his defection and retaliated against his business.

But "fair game" was not the only sanction which Scientology held over Wollersheim's head during his years as an

"upper level" auditor and occasional staff member. Scientology also used a tactic called "freeloader debt" as a means of coercing Wollersheim's continued participation in the church and obedience to its practices. "Freeloader debt" was devised by Scientology founder L. Ron Hubbard as a means of punishing members who, inter alia, chose to leave the Church or refused to disconnect from a suppressive person.

"Freeloader debt" was accumulated when a staff member received Church courses, training or auditing at a reduced rate. The Church maintained separate records which listed the discounts allowed. If the member later chose to leave, he or she was presented with a bill for the difference between the full price normally charged to the public and the price originally charged to the member.[2] A person who stayed in the Church for five years could easily accumulate a "freeloader debt" of between $10,000 and $50,000. Wollersheim was familiar with the "freeloader debt" policy as well as the "fair game" policy. He also knew the Church was recording the courses and auditing sessions he was receiving at the discounted rate. The threat of facing that amount of debt represented a powerful economic sanction acting to coerce continued participation in auditing as the core religious practice of the Church of Scientology.

There also was evidence Wollersheim accepted some of his auditing under threat of *physical* coercion. In 1974, despite his repeated objections, Wollersheim was induced to participate in auditing aboard a ship Scientology maintained as part of its Rehabilitation Project Force. The Church obtained Wollersheim's attendance by using a technique dubbed "bait and badger." As the name suggests, this tactic deployed any number of Church members against a recalcitrant member who was resisting a Church order. They would alternately promise the "bait" of some reward and "badger" him with

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2 During the 1970's a staff member was paid approximately $17 per week for an expected 50 hours of work. In 1973, Wollersheim earned between $10 to $18 per week when he worked at the Celebrity Center as a staff member. This salary was augmented by an occasional $10 bonus.

verbal scare tactics. In the instant case, five Scientologists "baited and badgered" Wollersheim continuously for three weeks before he finally gave in and agreed to attend the Rehabilitation Project Force.

But these verbal threats and psychological pressure tactics were only the beginning of Wollersheim's ordeal. While on the ship, Wollersheim was forced to undergo a strenuous regime which began around 6:00 A.M. and continued until 1:00 the next morning. The regime included mornings of menial and repetitive cleaning of the ship followed by an afternoon of study or co-auditing. The evenings were spent working and attending meetings or conferences. Wollersheim and others were forced to sleep in the ship's hole. A total of thirty people were stacked nine high in this hole without proper ventilation. During his six weeks under these conditions, Wollersheim lost 15 pounds.

Ultimately, Wollersheim felt he could bear the regime no longer. He attempted to escape from the ship because as he testified later: "I was dying and losing my mind." But his escape effort was discovered. Several Scientology members seized Wollersheim and held him captive. They released him only when he agreed to remain and continue with the auditing and other "religious practices" taking place on the vessel.

One of the psychiatric witnesses testified that in her opinion Wollersheim's experience on the ship was one of five cataclysmic events underlying her diagnosis of his mental illness and its cause. As the psychiatrist reported, following this incident, Wollersheim felt the Church "broke him." In any event, this episode demonstrated the Church was willing to physically coerce Wollersheim into continuing with his auditing. Moreover they were willing to do so even when it was apparent this practice was causing him serious mental distress and he preferred to cease or at least suspend this particular religious practice. Not only was the particular series of auditing sessions on the ship conducted under threat of physical compulsion, but the demonstrated willingness to use physical coercion infected later auditing sessions. The fact the Church was willing to use physical coercion on this occasion to compel Wollersheim's continued participation in auditing added

yet another element to the coercive environment under which he took part in the auditing process.

There was substantial evidence here from which the jury could have concluded Wollersheim was subjecting himself to auditing because of the coercive environment with which Scientology had surrounded him. To leave the church or to cease auditing he had to run the risk he would become a target of "fair game", face an enormous burden of "freeloader debt", and even confront physical restraint. A religious practice which takes place in the context of this level of coercion has less religious value than one the recipient engages in voluntarily. Even more significantly, it poses a greater threat to society to have coerced religious practices inflicted on its citizens.

There are important analogies to *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092. In *Molko* the California Supreme Court held a religious organization could be held civilly liable for using deception and fraud to *seduce* new recruits *into the church.*[3] In that case the church concealed from new recruits the fact they were enlisting in the Unification Church. The plaintiffs argued the Unification Church psychologically and physically coerced them into accepting the Church and, therefore, they were unable to refuse formally joining once the Church's true identity was revealed. (*Id.* at pp. 1108-1109.) The Supreme Court agreed and further concluded there was no constitutional infirmity to bar the action.

"We conclude, . . . that although liability for deceptive recruitment practices imposes a marginal burden on the Church's free exercise of religion, the burden is justified by the compelling state interest in protecting individuals and families from the substantial threat to public safety, peace

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3 In *Molko*, two plaintiffs brought actions against the Unification Church for, inter alia, fraud and intentional infliction of emotional distress based upon the Unification Church's initial misrepresentations concerning its religious affiliation. The Supreme Court held the First Amendment did not bar the plaintiffs' claims to the extent they were based upon actual coercive conduct by the Unification Church as opposed to merely the threat of divine retribution should the plaintiffs leave.

and order posed by the fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion." (*Id.* at p. 1118.)

Here Scientology used *coercion*—"fair game," "freeloader debt," and in this instance, at least, physical restraint, along with the threat one or more of these sanctions will be deployed—to prevent its members from *leaving* the Church. This coercion is similar to the coercion found in *Molko* and far different from the threats of *divine* retribution our Supreme Court held was non-actionable. (*Id.* at pp. 1120, 1122 ["To the extent the claims are based merely on threats of divine retribution if [the plaintiffs] left the church, they cannot stand].) Instead, Scientology promised—and in this case delivered—retribution in the here and now.

In *O'Moore* v. *Driscoll* (1933) 135 Cal.App. 770 cited with approval by the California Supreme Court in *Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1114, a Catholic priest sued a Catholic organization and an ordained priest for false imprisonment when the plaintiff was restrained in an asylum run by the Catholic Church to compel his confession to criminal acts. The practice of confessing one's sins is an established religious practice of the Catholic church. But that did not immunize the defendants from liability for harm the plaintiff suffered where the religious practice was imposed on him in a coercive environment. (*Id.* at p. 774.)

In the instant case except for the experience on the ship the coercion was more subtle than physical restraint. Yet the threat of "fair game" and "freeloader debt" and even the possibility of future physical restraint loomed over Wollersheim whenever he contemplated leaving Scientology and terminating auditing or the other practices of that religion.

It is not only the acts of coercion themselves—the sabotage of Wollersheim's business and the episode of captivity on the ship—which are actionable. These acts of coercion and the threat of like acts make the Church's other harmful conduct actionable as well. No longer is Wollersheim's continued participation in auditing (or for that matter, his compliance with the "disconnect" order) merely his *voluntary* participation in Scientology's religious practices. The evidence establishes

Wollersheim was coerced into remaining a member of Scientology and continuing with the auditing process. Constitutional guarantees of religious freedom do not shield such conduct from civil liability. We hold the state has a compelling interest in allowing its citizens to recover for serious emotional injuries they suffer through religious practices they are coerced into accepting. Such conduct is too outrageous to be protected under the constitution and too unworthy to be privileged under the law of torts.

We further conclude this compelling interest outweighs any burden such liability would impose on the practice of auditing. We concede as the California Supreme Court did in *Molko* that allowing tort liability for this conduct imposes some burden on appellants' free exercise of this religion.[4] Despite the possibility of liability Scientologists can still *believe* it serves a religious purpose to impose and threaten to impose various sanctions on staff members or upper level auditors who might leave the church or cease its core religious practices. But it does place a burden on Scientologists should they act on that belief. Scientology would be subject to possible monetary loss if someone suffers severe psychological harm during auditing where that auditing is conducted under the threat of these sanctions. Likewise, Scientology may lose some staff members and upper level auditors who would not continue in the Church or continue to submit to the core practice of auditing except for their fears of retribution.

Like the Supreme Court in *Molko*, however, we find these burdens "while real, are not substantial" and, moreover, are the minimum required to achieve the state interest. To borrow from the high court's language in *Molko*: "Being subject

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4 "While such liability does not impair the Church's right to believe in recruiting through deception, its very purpose is to discourage the Church from putting such belief into practice by subjecting the church to possible monetary loss for doing so. Further, liability presumably impairs the Church's ability to convert nonbelievers, because some potential members who would have been recruited by deception will choose not to associate with the Church when they are told its true identity." (*Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal. 3d 1092, 1117.)

to liability [for coerced auditing] does not in any way or degree prevent or inhibit [Scientologists] from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading [L. Ron Hubbard's] message among the population. It certainly does not, . . . compel [Scientologists] to perform acts 'at odds with fundamental tenets of their religious beliefs.' [Citation omitted.]" (*Molko* v. *Holy Spirit Assn.*, *supra*, 46 Cal.3d 1092, 1117.)

Most significantly, by imposing liability in the instant case we "in no way or degree prevent or inhibit" Scientology from continuing the free exercise of the religious practice of auditing. Returning to the words of the Supreme Court: "At most, it potentially closes one questionable avenue for" coercing certain members to remain in the church and to continue its core practices such as auditing." (46 Cal.3d at p. 1117.)

D. *The "Disconnect" Policy Is Not a Constitutionally Protected Religious Practice in the Circumstances of This Case*

Substantial evidence supports the conclusion Scientology encouraged Wollersheim to "disconnect" from family members, including his wife and parents. Furthermore, substantial evidence supports the conclusion Scientology has a general policy of encouraging members to "disconnect" from non-Scientologists who oppose Scientology or express reservations about its teachings.

The first question is whether the "disconnect" policy qualifies as a "religious practice" of Scientology. The trial court did not grant summary adjudication on this factual issue. Nonetheless, we find the evidence supported the conclusion disconnect is a "religious practice." "Disconnect" is similar in purpose and effect to the "shunning" practiced by Jehovah's Witnesses and Mennonites, among others. It also shares some attributes with the remote monasteries common to many other religions. All of these practices serve to isolate

members from those, including family members, who might weaken their adherence to the religion. Courts have held these policies qualify as "religious practices" of other religions. (See, e.g., *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875, 879-880; *Rasmussen* v. *Bennet* (Mont. 1987) 741 P.2d 755 [Church statements condemning plaintiffs' conduct and calling for shunning were privileged under the First Amendment].) We see no justification for treating Scientology's "disconnect" policy differently and thus hold it is a "religious practice".

We recognize the "shunning" cases have involved claims brought by former church members *whom other family members were ordered to shun*. The instant case, in contrast, involves a cause of action brought by a former church member *ordered to shun the rest of his family* not the other way around. In the circumstances of this case this is a distinction without a difference. Here appellants caused Wollersheim to isolate himself from his parents, wife and other family members even though appellants had reason to know it would inflict serious emotional injury on him. The injury to him and to the family was just as severe as if his family had "shunned" him.

We need not and do not reach the question whether the practice of "disconnect" is constitutionally protected religious activity in ordinary circumstances. (Contrast *Paul* v. *Watchtower Bible & Tract Soc. of New York*, *supra*, 819 F.2d 875 [religion cannot be held civilly liable to shunned former member because "shunning" is constitutionally protected] with *Bear* v. *Reformed Mennonite Church*, *supra*, 341 A.2d 105 [religion may be civilly liable to shunned former member because "shunning" must yield to compelling state interest in promoting family relations].) Whether or not the "disconnect" policy is constitutionally protected when practiced in a voluntary context it is not so protected if practiced in the coercive environment appellants imposed on Wollersheim. The reasons are the same as apply to "auditing." (See pp. 30-39, *supra*.) Substantial evidence supports the finding Scientology created this coercive environment and Wollersheim continued to submit to the practices of the

church such as "disconnect" because of that coercion. Furthermore, the evidence in the instant case is sufficient to support a factual finding appellants imposed the "disconnect" policy on Wollersheim with the knowledge he was psychologically susceptible and therefore would suffer severe emotional injury as a result. Accordingly, in the circumstances of this case, the free exercise clause did not immunize appellants from liability for the "disconnect" policy practiced on respondent.

E. *Scientology's Improper Disclosure of Information Wollersheim Gave During Confidential Religious Expressions Is Not Religious Expression Immunized From Liability by the Constitution*

There is substantial evidence Wollersheim divulged private information during auditing sessions under an explicit or implicit promise the information would remain confidential. Moreover, there is substantial evidence Scientology leaders and employees shared this confidential information and used it to plan and implement a "fair game" campaign against Wollersheim. Scientology argues there also is substantial evidence in the record supporting its defense that Scientology leaders and employees shared this confidential information only in accordance with normal procedures and for the purpose of gaining the advice and assistance of more experienced Scientologists in evaluating Wollersheim's auditing sessions. However, the jury was entitled to disregard this innocent explanation and to believe Wollersheim's version of how and why Scientology divulged information he had supplied in confidence.

The intentional and improper disclosure of information obtained during auditing sessions for non-religious purposes can hardly qualify as "religious expression." To clarify the point, we turn once again to a hypothetical situation which presents a rough analogy under a traditional religion. Imagine a stockbroker had confessed to a cleric in a confessional that he had engaged in "insider trading." Sometime later this same stockbroker leaves the church and begins criticizing it

and its leadership publicly. To discredit this critic, the church discloses the stockbroker has confessed he is an insider trader. This disclosure might be said to advance the interests of the cleric's religion in the sense it would tend to discourage former members from criticizing the church. But to characterize this violation of religious confidentiality as "religious expression" would distort the meaning of the English language as well as the United States Constitution. This same conclusion applies to Scientology's disclosures of Wollersheim's confidences in the instant case. And, since these disclosures do not qualify as "religious expression" they do not qualify for protection under the freedom of religion guarantees of the constitution. (See Discussion at pp. 18-19, *supra*.)

III. THE CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL INJURY MUST BE REVERSED

For reasons set forth in section II, we have concluded Scientology is not constitutionally immunized from civil liability for its cumulative course of conduct to intentionally inflict emotional injury on Wollersheim. However, this course of conduct does not supply a suitable predicate for a cause of action based on *negligent* infliction of emotional injury. These actions are potentially actionable only when they are driven by an animus which can properly qualify them as "outrageous conduct." That is, they must be done for the purpose of emotionally injuring the plaintiff, or at the least with reckless disregard about their adverse impact on plaintiff's mental health. (*Nally* v. *Grace Community Church*, *supra*, 47 Cal.3d 278, 300; *Miller* v. *National Broadcasting Co.* (1986) 187 Cal.App.3d 1463, 1487.)

We have held in the prior section that Scientology and its leaders indeed engaged in these actions with an intent to emotionally injure Wollersheim. But this intentional activity was alleged in the intentional infliction of emotional injury count and was tried under that count. The negligence count, on the other hand, of necessity alleges a lesser degree of culpability

and can be sustained only if the defendant could be liable even if the emotional injuries were caused by completely unintentional, merely negligent acts or omissions. (See *Slaughter* v. *Legal Process Courier Service* (1984) 162 Cal.App.3d 1236, 1249; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 838, p. 195.)

In this context, Scientology is responsible only if it or any other religion could be held liable where through inadvertence something it or its leaders did damaged someone's business and thereby caused the businessman emotional injury. Or if it or any other religion could be held liable where it inadvertently revealed some information a member had disclosed in confidence as part of a religious practice like auditing or a confession. Or if it or another religion could be held liable where its functionaries inadvertently said something during auditing or a sermon or a confession which triggered a listener's nascent mental illness.

At bottom, this question of duty is a matter of weighing competing public policy considerations. (*Dillon* v. *Legg* (1968) 68 Cal.2d 728, 734; *Ballard* v. *Uribe* (1986) 41 Cal.3d 564, 572, fn. 6.)[5] On balance, the religious freedom consideration outweighs any concern about spreading the cost of emotional injury, reducing the frequency of such emotional injuries, and the like. It is one thing to say we will impose liability when a religious organization intentionally or recklessly sets out to ruin a business or to reveal confidential information or to "audit" mercilessly or to "disconnect" a psychologically weak person from his family and thereby succeeds in emotionally injuring a member or former member of that religion. It is quite another to impose liability for negligent acts which inadvertently cause the same types of injuries. (See *Coon* v. *Joseph* (1987) 192 Cal.App.3d 1269, 1273.)

Since we hold religious organizations owe no duty to members or former members with respect to these forms of

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5 " '[D]uty' is not an immutable fact of nature ' "but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' [Citation.]" (*Ballard* v. *Uribe*, *supra*, 41 Cal.3d at p. 572, fn. 6.)

injury, the cause of action for negligent infliction of emotional injury must be reversed. We need not, however, reverse the entire judgment. Here, the jury found the Church liable for both negligent and intentional infliction of emotional distress. As we discussed above, there is substantial evidence to support a finding on the intentional infliction theory. We may fairly presume any damages awarded on the negligence theory are subsumed in the award for intentional infliction of emotional distress. Accordingly, any error in allowing the jury to consider the negligence theory does not affect the judgment. (See *Vahey* v. *Sacia* (1981) 126 Cal.App.3d 171, 179-180; *Bacciolieri* v. *Charles C. Meek Milling Co.* (1959) 176 Cal.App.2d 822, 826.)

IV. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS TO DISMISS FOR FAILURE TO FILE BEFORE THE STATUTE OF LIMITATIONS HAD EXPIRED ON WOLLERSHEIM'S CAUSES OF ACTION

Scientology argues on appeal, as it did at virtually every opportunity below, that Wollersheim's causes of action are barred by the statute of limitations. At each and every juncture the various trial judges who heard these arguments rejected them. These judges ruled correctly that Wollersheim's causes of action were subject to the discovery rule. (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 356, p. 383.) The issue in each instance, thus, was *when* Wollersheim discovered, or should have discovered, all of the elements of his cause of action against Scientology. (*See Leaf* v. *City of San Mateo* (1980) 104 Cal.App.3d 398, 407-408.) The trial judges properly ruled this issue, in turn, was a jury question. (*Id.* at p. 409.)

On appeal, this court is bound to uphold the jury's resolution of these factual questions unless we determine the findings are not supported by substantial evidence. After a careful review of the evidence, we conclude these findings about the timeliness of Wollersheim's filing of this case are supported by substantial evidence. Consequently, we affirm

the rulings by the judges below and, furthermore, we likewise affirm the factual findings the jury impliedly made that Wollersheim did not discover and should not have discovered his causes of action until a time within the statutory period.

V. THE TRIAL COURT DID NOT COMMIT INSTRUCTIONAL ERROR OR EVIDENTIARY ERROR DURING THIS FIVE-MONTH TRIAL WHICH DENIED APPELLANTS A FAIR TRIAL OR DUE PROCESS OF LAW

Appellants' final contention is that they were denied a fair trial and due process of law because of various instructional and evidentiary rulings the court made during this five-month trial. Considering the length of the trial it is surprising appellants were able to identify so few questionable rulings.

Appellants first complain the trial court erroneously denied two instructions they requested. The first of these instructions restated the elements of the cause of action for intentional infliction of emotional distress or outrageous conduct with a slant favoring appellants' position.[6]

As requested the instruction implied the jury was to disregard evidence of appellants' acts which did not fit precisely

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6 The requested instruction reads:

"Plaintiff's claim for intentional infliction of emotional distress, or outrageous conduct, is divided into several parts. [¶] First, plaintiff's claim that defendant engaged in outrageous conduct by subjecting plaintiff to its practice of auditing—which, as I shall instruct you, is the central religious practice of the religion of Scientology. [¶] Second, plaintiff claims that defendant caused plaintiff to separate from his family and friends as a condition for remaining in Scientology. [¶] Third, plaintiff claims that defendant 'attacked plaintiff's business' and induced those of his employees who were Scientologists to leave his employ. [¶] Fourth, plaintiff claims that defendant disclosed his auditing files in disregard of alleged promises of confidentiality to persons not authorized to receive them. [¶] All of these acts were allegedly undertaken to inflict severe emotional distress upon the plaintiff. [¶] The plaintiff is restricted in this case to the claims he set forth in his complaint. Evidence of any purported acts of the defendant not relating to the four categories I have just described to you may not be considered in determining whether plaintiff has established that defendant committed the tort of intentional infliction of emotional distress [App. A306-07]."

under the courses of conduct as they defined them. Actually the plaintiffs' causes of action were broader in many respects than the descriptions the appellants requested. Moreover, some of the evidence introduced at the trial related to acts relevant to issues of appellants' state of mind (intent, motivation, and the like) and whether respondent was voluntarily participating in Scientology's practices or was doing so within a coercive environment. Accordingly, the instruction as requested would have been misleading to the jury. The trial court gave an instruction which set forth the elements of the cause of action. Any amplification of that instruction should have been more accurate than the one appellants requested and less misleading as to the full scope of the jury's range of inquiry. Thus it was not error to refuse to give this instruction.

Appellants also complain about the refusal of one of their requested instructions ordering the jury in very specific fashion to disregard evidence presented which was relevant to the non-suited fraud counts. Again, the requested instruction was stated in overbroad terms and unduly slanted in appellants' direction. For instance, as requested, it instructed the jury that "it must disregard evidence presented in this trial regarding statements purportedly made to [the plaintiff] to induce his participation in defendant church." If given, this instruction could have misled the jury into believing it must disregard evidence which provided context for the intentional infliction count or which went to the presence or absence of coercion and appellants' state of mind. So once again it was not error to refuse these instructions. (See *Wank* v. *Richman & Garrett* (1985) 165 Cal.App.3d 1103, 1113; *Lubek* v. *Lopes* (1967) 254 Cal.App.2d 63, 73.)

In any event, on reviewing the total evidence offered in this trial, we find that even if it were error to refuse these instructions that error was not prejudicial. (*Henderson* v. *Harnischfeger* (1974) 12 Cal.3d 663, 670; *Williams* v. *Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 489; see 9 Witkin, Cal. Procedure, *supra*, Appeal, § 352, pp. 355-356.) We cannot say that the giving of these instructions would

have substantially enhanced the chances appellants would have prevailed.

Appellants likewise complain about evidentiary rulings. Although they mention only a handful of specific incidents, they accuse the judge of admitting a mass of prejudicial evidence about actions Scientology took toward third persons. In their brief appellants concede this evidence was admissible under Evidence Code section 1101(b) as proof of "intent" and "malice."[7] But they ask us to reverse the trial court under Evidence Code section 352 on grounds the relevance of this evidence was overwhelmed by its prejudicial effect.[8]

In reviewing the trial court's exercise of its discretion under section 352, appellate courts traditionally give great deference to the trial court's evaluation of relevance versus prejudice. (See *People* v. *Mota* (1981) 115 Cal.App.3d 227, 234; 1 Johnson, Cal. Trial Guide (1988) § 22.40, p. 22-43.) In the instant case we do not find an abuse of discretion. Much of the evidence appellants object to was highly relevant to show the network of sanctions and coercive influences with which Scientology had surrounded Wollersheim. Much of the rest was highly relevant to show Wollersheim's state of mind while undergoing audit, disconnect and the like or appellants' state of mind, that is, their intent, malice, motives, and the like. Whatever prejudice to appellants may have accompanied introduction of this evidence it does not "substantially outweigh" the probative value of the evidence to important issues in this case.

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7 "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid. Code, § 1101, sub. (b).

8 "The court in its discretion may exclude evidence if its probative value *is substantially outweighed* by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, italics added.)

Finally, appellants complain about the alleged prejudicial conduct of Wollersheim's counsel during the trial and closing argument. As was true of their claims of instructional and evidentiary evidence, appellants provide us with only a few examples of alleged prejudicial error and imply these are but the tip of the iceberg. They confine themselves to this handful of incidents either because no other potentially prejudicial incidents occurred or because they expect this court to do their job by scouring the 25,000 page record for other examples to bolster their claim of error. If what appellants set forth in their brief represent the only incidents they allege as prejudicial conduct, we find them insufficient to justify reversal under applicable standards of prejudice. (*Garden Grove School Dist.* v. *Hendler* (1965) 63 Cal.2d 141, 144 [attorney misconduct only requires reversal if "it is reasonable to conclude that a verdict more favorable to defendants would have been reached but for the error"]; see 9 Witkin, Cal. Procedure, *supra*, § 340, p. 346.) And if these brief examples were only an invitation to do appellants' work in identifying prejudicial error in their opposing attorney's conduct, we decline that invitation. (*Horowitz* v. *Noble* (1978) 79 Cal.App.3d 120, 139 [" 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment' "]; *Wint* v. *Fidelity & Casualty Co.* (1973) 9 Cal.3d 257, 265.)

VI. THE GENERAL DAMAGES AND PUNITIVE DAMAGES THE JURY AWARDED ARE EXCESSIVE FOR THE INTENTIONAL INFLICTION OF EMOTIONAL INJURY COUNT AND THUS THOSE DAMAGE AWARDS MUST BE REDUCED

In the previous section, we concluded the allegations which are supported by substantial evidence are enough to sustain a cause of action for intentional infliction of emotional injury against Scientology. But that conclusion does not determine whether the proved allegations support the level of damages the jury awarded under this cause of action. We turn to that issue now.

We are only concerned now with whether a reasonable juror could have found this level of "outrageous" conduct inflicted $5 million worth of emotional injury on Wollersheim. Similarly, we ask whether this level of "outrageous" conduct and Scientology's degree of intent in carrying it out warrant $25 million in punitive damages. We conclude these awards are excessive for the conduct alleged and proved in this case.

An award for compensatory damages will be reversed or reduced "upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion." (*Koyer* v. *McComber* (1938) 12 Cal.2d 175, 182; accord *Schroeder* v. *Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919 ["an appellate court may reverse an award only ' "When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice' " [Citations]"]; *Fagerquist* v. *Western Sun Aviation, Inc.* (1987) 191 Cal.App.3d 709, 727; see 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, § 46, p. 446.) Even under this stringent standard, it is manifest the jury's award here is excessive since it is so grossly disproportionate to the evidence concerning Wollersheim's damages.

Wollersheim's psychological injury although permanent and severe is not totally disabling. Moreover, even Wollersheim admits Scientology's conduct only aggravated a preexisting psychological condition; Scientology did not create the condition. While the jury awarded Wollersheim $5 million in compensatory damages, we determine the evidence only justifies an award of $500,000.

"It is well established that a reviewing court should examine punitive damages and, where appropriate, modify the amount in order to do justice." (*Gerard* v. *Ross* (1988) 204 Cal.App.3d 968, 980; *Allard* v. *Church of Scientology*, *supra*, 58 Cal.App.3d at p. 453.) In reviewing a punitive damages award, the appellate court applies a standard similar to that used in reviewing compensatory damages, i.e., whether, after reviewing the entire record in the light most

favorable to the judgment, the award was the result of passion or prejudice. (See *Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 64; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 388.) However, the test here is somewhat more refined, employing three factors to evaluate the propriety of the award.

The first factor is the degree of reprehensibility of the defendant's conduct. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) "[C]learly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal." (*Ibid.*)

The second factor is the relationship between the amount of the award and the actual harm suffered. (*Ibid.*; *Seeley* v. *Seymour* (1987) 190 Cal.App.3d 844, 867.) This analysis focuses upon the ratio of compensatory damages to punitive damages; the greater the disparity between the two awards, the more likely the punitive damages award is suspect. (*Seeley* v. *Seymour*, *supra*, 190 Cal.App.3d at p. 867; see *Little* v. *Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469-470.)

Finally, a reviewing court will consider the relationship of the punitive damages to the defendant's net worth. (*Neal* v. *Farmers Ins. Exchange*, *supra*, 21 Cal.3d at p. 928; *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal. App.3d at p. 390.) In applying this factor courts must strike a proper balance between inadequate and excessive punitive damage awards. "While the function of punitive damages will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort, the function also will not be served by an award which is larger than necessary to properly punish and deter." (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal.App.3d at p. 391.)

As to the punitive damage award, we find it is not commensurate with Scientology's conduct *in this case*. This is not a situation where the centerpiece of the case involved a Church-ordered physical beating or theft or criminal fraud against Wollersheim. The "outrageous conduct" was less outrageous and more subtle than that. We further note Wol-

lersheim's counsel in the full flood of his emotional summation at the conclusion of this lengthy trial only deigned to urge the jury to return punitive damages of *as much as* "six or seven million dollars."

The evidence admitted at trial supported the finding the appellant church had a net worth of $16 million at the time of trial. Accepting these figures as true, the jury awarded Wollersheim *150 percent of* appellant's net worth in punitive damages alone—195 percent if compensatory damages are included. This appears not just excessive but preposterous. (*Seeley* v. *Seymour*, *supra*, 190 Cal.App.3d at p. 869 [punitive damages reversed; award was 200 percent of defendant's net worth]; *Burnett* v. *National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 1012 [punitive damages reduced; initial award was 35 percent of defendant's net worth]; *Egan* v. *Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 824 [punitive damages reversed; award was 58 percent of defendant's net income]; *Allard* v. *Church of Scientology*, *supra*, 58 Cal.App.3d at pp. 445-446, 453 [punitive damages reversed; award was 40 percent of defendant's net worth]; compare *Devlin* v. *Kearney AMC/Jeep/Renault, Inc.*, *supra*, 155 Cal.App.3d at pp. 391-392 [punitive damages affirmed where award was 17.5 percent of defendant's net worth]; *Schomer* v. *Smidt* (1980) 113 Cal.App.3d 828, 836-837 [punitive damages affirmed; award was 10 percent of defendant's net worth]; *Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1100 [punitive damages affirmed; award was 7.2 percent of defendant's net income].) We find it especially excessive given the nature of the "outrageous conduct" in this particular case. Accordingly we reduce the punitive damage award to $2 million.

DISPOSITION

The judgment is reversed as to the cause of action for negligent infliction of emotional injury. The judgment as to the cause of action for intentional infliction of emotional injury is modified to reduce the compensatory damages to $500,000

and the punitive damages to $2 million. In all other respects the judgment is affirmed. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

LILLIE, P.J.

WOODS (Fred), J.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

C332 027
Dept. 117N
Honorable Ronald Swearinger

LARRY WOLLERSHEIM

vs.

CHURCH OF SCIENTOLOGY

Dated: September 18, 1986

Counsel for Plaintiff: CHARLES O'REILLY

Counsel for Defendant: GEORGE ROSENBERG
EARLE COOLEY
JOHN PETERSON

NOTICE OF RULING

DEFENDANT'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

Denied

and

DEFENDANT'S MOTION FOR NEW TRIAL

Denied

A copy of this minute order is sent via U.S. Mail this date to:

EARLE C. COOLEY
COOLEY, MANION, MOORE & JONES
530 Atlantic Avenue
Boston, MA 02210

JOHN G. PETERSON
PETERSON & BRYAN
8530 Wilshire Blvd. Ste. 407
Beverly Hills, CA 90211

CHARLES O'REILLY
GREENE, O'REILLY, et al.
816 S. Figueroa Street
Los Angeles, CA 90017

MINUTE ORDER

APPENDIX E

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

C332 027

Dept. 50

Honorable Alfred L. Margolis

LARRY WOLLERSHEIM

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA

Dated: October 21, 1985

Counsel for Plaintiff:
GREENE, O'REILLY, BROILLET, ETC.
BY: CHARLES O'REILLY
STEVE WILSON
LETA ST. CLAIR SCHLOSSER

Counsel for Defendant:
OVERLAND, BERKE, WESLEY, GITS, ETC.
BY: R. BURKE
KAREN MCCABE
PAUL MOORE
EARL COOLEY

JURY TRIAL

Matter comes regularly on calendar this date for hearing having been continued from October 17, 1985, with all counsel present as here-to-fore.

The clerk filed three telegrams, twenty-three mail grams, two special deliveries, one intelpost, and one letter that were received on October 18, 1985, between the hours: 10:15 a.m., and 11:25 a.m.

At approximately 8:50 a.m., the clerk filed defendant's request for protective order; defendant's motion to exclude exhibits from record; and, defendant's reply to plaintiff's memorandum of law.

At approximately 9:00 a.m., the clerk filed one telegram, five letters, one cable, thirty-three mail grams, and telephonically received one cable and one telegram.

In open court, the court orders that there are to be no recording devices in the court room; and, that no further motions are to be filed by either side, except by written request and leave of the court first obtained.

As to defendant's motion in limine relative to triable issues, the court *grants* defendant's motion as to items No. 1, No. 2, and No. 3; all other issues are DENIED.

As to defendant's motion to quash plaintiff's motion to appear, as to L. Ron Hubbard, the motion is deferred for ruling with defendant to file further points and authorities at 9:15 o'clock on October 22, 1985.

Defendant's motion to sequester the jury is DENIED.

Defendant's motion for separate trials as to the issues of liability and damages is DENIED.

Motion of plaintiff to produce certain documents at trial is granted as to the plaintiff, his mother, his father, his sister, the law firm of GREENE, O'REILLY, BROILLET, ETC., and Associates, attorney, Lita Schlosser, Charles O'Reilly and documents are to be delivered by October 28, 1985.

The court orders that service in this case is to be made, one on the other, between the hours of 9:00 a.m., and 5:00 p.m.,

on Monday through Friday, excluding holidays, except by explicit agreement.

At approximately 10:30 a.m., matter is recessed and counsel are instructed to file all additional and supplemental documents at 9:15 a.m., on October 22, 1985, in Department and that the court will render all further rulings on motions in limine at 1:30 p.m.

At approximately 1:30 p.m., the clerk filed one telegram, two mailgrams, three electronic letters, twelve pages of electronic messages; and one hundred fifty-seven letters which were hand-delivered, and are not postmarked.

At approximately 3:00 p.m., the clerk filed one special delivery, and one INTELPOST (U.S. Electronically transmitted first classmail).

MINUTE ORDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. C 332 027

LARRY WOLLERSHEIM,

Plaintiff,

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al.,

Defendants.

MOTION IN LIMINE CONCERNING SCOPE OF TRIABLE ISSUES; FIRST AMENDMENT; PRIEST PENITENT PRIVILEGE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF ROBERT BERKE; DR. FRANK FLINN, REVEREND KENNETH HODEN; MADELINE HOOPER

Date: October 15, 1985

Time: 9:15 A.M.

Dept: 50

TO THE CLERK OF THIS COURT AND TO COUNSEL FOR THE PLAINTIFF IN THE ABOVE ENTITLED ACTION;

Defendant Church of Scientology of California hereby moves this Court to exclude certain evidence as may be offered in support of each of the respective causes of action herein on the grounds that the First Amendment to the United States Constitution prohibits inquiry by judge or jury into the nature, truth or falsity, and interpretation of the religious practices and tenets of any religion, including, in this instance, the Church of Scientology.

The Defendant Churches of Scientology hereby moves *in limine* for a pre-trial order that Plaintiff Larry Wollersheim not be allowed to introduce into evidence at trial any evi-

dence or allegations concerning constitutionally protected religious activities, beliefs, and practices of the religion of Scientology, the Church of Scientology, or of Scientologists, including the following such matters which are the subject of the four counts of the Complaint in this case:

1. The Church of Scientology's belief in, and practice of, auditing.
2. Representations alleged to have been made by any members of any Church of Scientology with respect to the benefits, nature, or efficacy of auditing.
3. Evidence of acts or history as to the alleged successes or failures of auditing.
4. Confidential counseling materials utilized by the Church of Scientology of California for providing religious counseling to parishioners.
5. Beliefs, practices and policies relating to the methods by which Scientology is taught, preached or proselytized.
6. Confidential communications occurring in a religious setting between ministers of the Church and Plaintiff Wollersheim or any other present or former member of the Church.
7. Donations, expenditures of funds, or services given by the plaintiffs or others, to the Church of Scientology, as offerings or in exchange for services, training, books, courses, and auditing.
8. The relationship between Church and parishioners, including but not limited to the manner in which a parishioner's private and confidential information is handled within the Church.
9. The alleged Church doctrines of "disconnect" and "fair game" or any doctrine regulating the relationships between Scientologists and non-Scientologists or between Scientologists and former Scientologists.
10. Evidence of or relating to the internal structure of the Church or the Church's Justice and Ethics Sys-

tem or financial affairs of the Churches of Scientology or of the Scientology movement.

11. Evidence of the methods by which the Church of Scientology maintains discipline, purity of faith, and loyalty among its adherents.
12. Evidence of the relationship between the Church of Scientology and its adherents.

This Motion is based upon the pleadings and files in this action, the attached Memorandum of Points and Authorities, and such additional evidence and argument as is presented at the hearing on the Motion.

DATED: September 25, 1985

Respectfully submitted,

OVERLAND, BERKE, WESLEY,
GITS, RANDOLPH & LEVANAS
A Professional Corporation

By _____
ROBERT BERKE
Attorneys for Defendant Church of Scientology of California

Appendix F

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 88

HON. NORMAN L. EPSTEIN, *JUDGE*

No. C332027

LARRY WOLLERSHEIM,

Plaintiff,

VS.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, ET AL.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, JUNE 14, 1985

* * * * *

[THE COURT:] So to the extent that there is a challenge to the timeliness of the motion for summary judgment, that objection is not upheld. I believe the motion is timely and the issue is properly before me.

I've read the papers and considered the matter. I am cognizant that matters are delicate when they are in a first amendment posture. And the first amendment is invoked in this litigation. So I am sure the point that will be alluded to that aspect of it does not have to be belabored. At least, for the purposes of reminding me that it is a first admendment situation. I am aware of that.

Even if it's the case that one court or another at one time or another has held that Scientology is or is not a religion, I don't think that that fact, if it is a fact, is conclusive on this

litigation. And I have some question as to whether it's even relevant to this litigation. If, as in the Founding Church case, we are dealing with a religion so long and well established that there could be no question whatsoever, then the existence of the entity as a religion is subject to judicial notice. If that's not the situation, then it can be an evidentiary matter.

The moving party describes this as a question of law. I think what it actually is is a mixed question of law and fact. There are factual matters which, if established up to a certain threshold, may require a conclusion of law that the entity is a religion.

My tentative views with respect to the summary judgment and summary adjudication of issues are these: I think I should grant number five. Scientology is a religion. I think the moving papers sufficiently establish that. I have no separate statement presented by the opposition as required by section 437c. And as to the extent that factual matters are invoked, as I believe they are, with respect to that issue, any controverting should be by a separate statement with the appropriate citations as required by the code. That's not done.

The supporting documents for the proposition that Scientology is a religion do more than make a prima facie case; they make a strong case. And I am satisfied, based on the posture of what I have, and I am referring particularly to the declaration of Mr. Flinn, that number five should be granted. My tentative view is that all the others should be denied.

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

C332 027

Dept. 88

Honorable Norman L. Epstein

LARRY WOLLERSHEIM

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al.

Dated: June 14, 1985

Counsel for Plaintiff:
LETA ST. CLAIR SCHLOSSER
CHARLES B. O'REILLY
STEVE WILSON

Counsel for Defendant:
TAYLOR, ROTH & BUSH
ROBERT KROPP, JR.
HARRISON W. HERTZBERG
ERIC M. LIEBERMAN

MOTION OF DEFENDANT CHURCH OF SCIENTOLOGY OF CALIFORNIA FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION OF ISSUES

1) Court rules on evidentiary objections as reflected in the reporter's notes.

2) The motion is timely.

3) Court denies summary judgment. Of the summary adjudication of issues, Court grants #5 and denies all others. Each of the others asks the Court to rule that conduct of defendant *as alleged* is not actionable. This requires that moving party negative these claims—i.e., show that the factual statements are untrue—or establish that a basis of relief is not stated even if they are factually correct. Moving party has failed to do this. No declaration is presented by anyone who claims to have been an auditor or supervisor of an auditor who treated with plaintiff. It is not proven that those who did treat with plaintiff did so out of religious conviction. If those persons acted *as alleged*, their conduct is actionable.

4) Considering the proximity of a trial date, the running of the 5-year period, and the nature of the motion (it could have been brought at almost any point in the litigation) and the absence of the statutory showing, ruling should not be deferred under 437c(h). Bifurcation should be decided by the trial court.

Counsel for responding parties are to prepare the orders and submit with approval as to form.

The Court orders the County Clerk to safeguard the file in a single place pending formal order for sequestering. Court will mail Intended Decision to counsel re sequestering for comments, prior to making formal order.

MINUTE ORDER